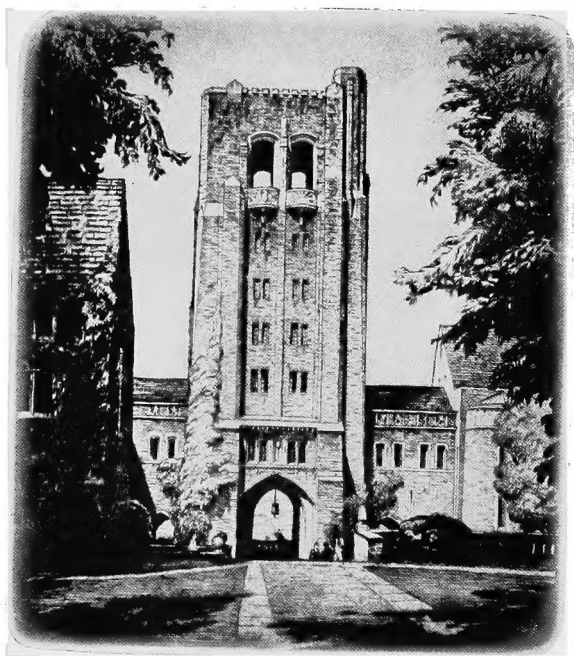


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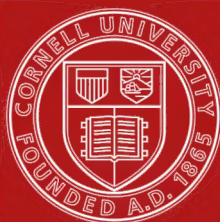
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**A treatise on the law of injunctions /**



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A TREATISE  
ON THE  
LAW OF INJUNCTIONS

BY  
JAMES L. HIGH

FOURTH EDITION  
REVISED AND GREATLY ENLARGED

BY  
SHIRLEY T. HIGH  
OF THE CHICAGO BAR

IN TWO VOLUMES  
VOL. II

CHICAGO  
CALLAGHAN AND COMPANY  
1905

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# THE LAW OF INJUNCTIONS.

## CHAPTER XVII.

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§ 988. **Foundation of the jurisdiction; superiority of the equitable remedy.** The preventive jurisdiction of equity as exercised by the remedy of injunction in restraining the infringement of copyrights, as in cases of the infringement of patents, rests in the necessity of preventing irreparable mischief and vexatious litigation, and of extending better protection to the rights of authors and their representatives than can be had by the process of courts of law.<sup>1</sup> The jurisdiction is exercised for the purpose of making effectual the legal right, which can not be done by an action for damages, and equity therefore interferes to render such right effective by enjoining the publication of the infringing work.<sup>2</sup> Indeed, a court of equity is manifestly the better forum for the protection of a copyright, since a court of law can not afford as ample redress, either for the past violation of the right, or for the prevention of a threatened or anticipated violation in the future. A court of law can neither compel a discovery of sales, nor an accounting as to such sales, nor can it prevent a multiplicity of suits, which is effected

<sup>1</sup> 2 Story's Eq., § 930; *Saunders v. Aiken*, 17 Ves., 422.

<sup>2</sup> *Wilkins v. Aiken*, 17 Ves., 422.



by the proceeding in equity; while equity has undoubted jurisdiction over a bill for an injunction and an accounting for the protection of a copyright, and may restrain a future violation, as well as require an account for past infringement.<sup>3</sup>

§ 989. **Jurisdiction of the courts, federal and state; statutory and common law right.** In this country the jurisdiction for the protection of statutory copyright is exercised exclusively by the United States courts. The circuit courts of the United States are invested with original jurisdiction of all suits, either at law or in equity, which arise under the copyright laws, and this jurisdiction is in no manner dependent upon either the citizenship of the parties, or the amount involved in the controversy.<sup>4</sup> Express jurisdiction is also conferred to restrain by bill in equity the infringement of copyright,<sup>5</sup> and the power thus lodged in the courts of the United States is treated as exclusive in all cases where judicial protection is invoked in aid of the statutory right.<sup>6</sup> The common law right, however, or the right of literary prop-

<sup>3</sup> *Pierpont v. Fowle*, 2 Woodb. & M., 23. As to the right to a forfeiture of copies under the English statutes, upon a bill to restrain an infringement of copyright, see *Colburn v. Simms*, 2 Hare, 543.

<sup>4</sup> Section 629 of the Revised Statutes of 1874, still in force, enacts as follows: "The circuit courts shall have original jurisdiction as follows: \* \* \* Ninth, of all suits at law or in equity arising under the patent or copyright laws of the United States." 1 U. S. Comp. Stat. 1901, pp. 503, 504.

<sup>5</sup> Section .970 of the Revised Statutes of 1874, still in force, provides that "The circuit courts, and

district courts having the jurisdiction of circuit courts, shall have power, upon bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violation of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, on such terms as the court may deem reasonable." 3 U. S. Comp. Stat. 1901, p. 3416.

<sup>6</sup> Upon the subject of the jurisdiction of the United States courts in copyright cases, consult the scholarly and exhaustive treatise of Mr. Drone on the Law of Copyright, page 544 *et seq.* See also *Dudley v. Mayhew*, 3 N. Y., 9.

erty which every author has in his manuscript prior to its publication, when the common law right becomes merged in the statutory one,<sup>7</sup> may be enforced and protected in the state courts; or, if the requisite conditions of citizenship exist, in the courts of the United States.<sup>8</sup> The distinction between the two rights, that by common law and the statutory right, is clearly defined, and an author has an unquestioned property in his works until publication by the common law, in which right he will be protected. And in this sense the statutes governing the subject of copyright are, to a certain extent, ancillary to the common law right, continuing such right after the publication is in print, but in no manner impairing it while the literary composition remains in manuscript.<sup>9</sup>

§ 990. **Strict compliance with statutory conditions necessary.** The first and one of the most essential requisites to relief by injunction, in cases of infringement of copyright, is a strict compliance on the part of the author or proprietor seeking relief with the conditions prescribed by statute as necessary to the vesting of the right. These conditions, under the present statute, include the filing of a printed copy of the title page with the Librarian of Congress on or before the day of publication; the transmittal to the Librarian of two printed copies not later than the day of publication, and the printing of a notice of the entry upon the title page or succeeding page.<sup>10</sup> Substantially similar con-

<sup>7</sup> See *Millar v. Taylor*, 4 Burr., 2303; *Wheaton v. Peters*, 8 Pet., 591.

<sup>8</sup> *Drone on Copyright*, 546.

<sup>9</sup> *Millar v. Taylor*, 4 Burr., 2303; *Wheaton v. Peters*, 8 Pet., 591; *Woolsey v. Judd*, 4 Duer, 389; *Boucicault v. Wood*, 16 Am. Law Reg., 539; S. C., 2 Biss., 34. And see *Keane v. Wheatley*, 9 Am. Law Reg., 33.

<sup>10</sup> Section 4956 of the Revised Statutes of 1874 upon this point, as amended by the act of March 3, 1891 (26 Stat., 1107) and as now in force, is as follows, the portion in italics being what was added, and that in brackets what was omitted, by the amendment: "No person shall be entitled to a copyright unless he shall, *on or before the day of publication, in this or*



ditions were imposed by the various acts of Congress which had been previously passed, regulating the subject of copyright, and a uniform construction has always been given to these provisions. That construction is, that the conditions

*any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or chromo, (or other article,) or a description of the painting, drawing, (chromo,) statue, statuary, or a model or design for a work of the fine arts for which he desires a copyright, nor unless he shall also, (within ten days from) not later than the day of the publication thereof in this or any foreign country, deliver at the office of the Librarian of Congress, at Washington, District of Columbia, or deposit in the mail within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print, or photograph, (or other article,) or in case of a painting, drawing, statue, statuary, model or design for a work of the fine arts, a photograph of (the) same: Provided, That in the case of a book, photograph, chromo, or lithograph, the two copies of the same required to be delivered or deposited as above shall be printed from type set*

*within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom. During the existence of such copyright the importation into the United States of any book, chromo, lithograph, or photograph, so copyrighted, or any edition or editions thereof, or any plates of the same not made from type set, negatives, or drawings on stone made within the limits of the United States, shall be, and it is hereby, prohibited, except in the cases specified in paragraphs five hundred and twelve to five hundred and sixteen, inclusive, in section two of the act entitled 'An act to reduce the revenue and equalize the duties on imports, and for other purposes,' approved October first, eighteen hundred and ninety; and except in the case of persons purchasing for use and not for sale, who import subject to the duty thereon, not more than two copies of such book at any one time; and except in the case of newspapers and magazines, not containing in whole or in part matter copyrighted under the provisions of this act, unauthorized by the author, which are hereby exempted from prohibition of importation: provided, nevertheless, That in the case of books in foreign languages, of which only*

imposed are not merely directory, but that they are indispensable prerequisites to the creation of any copyright or the vesting of any title under the statute, and that their strict performance is absolutely essential to warrant relief in equity by injunction against the infringement.<sup>11</sup> And a

*translations in English are copyrighted the prohibition of importation shall apply only to the translation of the same, and the importation of the books in the original language shall be permitted.*" 3 U. S. Comp. Stat. 1901,

3407. The provision of the act of July 8, 1870, with respect to publication of notice of entry for copyright (c. 230, § 97, 16 Stat., 214), as amended by the act of June 18, 1874 (18 Stat., 78), and as now in force, is as follows, the portion in italics being what was added, and that in brackets what was omitted, by the amendment: "No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some *visible* portion (of the face or front) thereof, or (on the face) of the substance on which the same shall be mounted, the following words, viz.: 'Entered according to act of Congress, in the year —, by A. B., in the

office of the Librarian of Congress, at Washington;' or, at his option the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out; thus —'Copyright, 18—, by A. B.' " 3 U. S. Comp. Stat. 1901, p. 3411, § 4962.

<sup>11</sup> *Wheaton v. Peters*, 8 Pet., 591; *Jollie v. Jaques*, 1 Blatch., 618; *Baker v. Taylor*, 2 Blatch., 82; *Struve v. Schwedler*, 4 Blatch., 23; *Chase v. Sanborn*, 6 Pat. Off. Gazette, 932; *Parkinson v. Laselle*, 3 Sawy., 330; *Higgins v. Keuffel*, 140 U. S., 428, 11 Sup. Ct. Rep., 731. And see *Callaghan v. Myers*, 128 U. S., 617, 9 Sup. Ct. Rep., 177. *Wheaton v. Peters* was decided under the statutes of 1790 and of 1802. The act of 1790 required the deposit of a printed copy of the title with the clerk in advance of publication; publication of a copy of the record thereof within two months thereafter in one or more newspapers for four weeks; and delivery of a copy of the book to the Secretary of State of the United States, within six months after publication. 1 U. S. Statutes at Large, 125. The act of 1802 imposed as an additional condition the printing of the notice of entry of copyright on the title page or on the succeeding page. Construing these statutes and the conditions

bill to enjoin an infringement of copyright is, therefore, demurrable which fails to aver a performance of these conditions.<sup>12</sup> But a mistake of a year in the notice of entry required to be printed upon the title page, or the succeeding page, as by printing 1866 for 1867, the latter being the actual year of the entry, will be regarded as immaterial and as constituting no bar to an injunction.<sup>13</sup> But under the English copyright act it is held that errors in the date of registration of the entry and in the name of the publishers, although technical objections, nevertheless constitute sufficient ground for sustaining a demurrer to a bill for injunction against an infringement of copyright.<sup>14</sup> Nor can a plaintiff maintain a bill to restrain the piracy of his publi-

which they imposed, the court in *Wheaton v. Peters*, 8 Pet., 663, use this language: "But we are told they are unimportant acts. If they are indeed wholly unimportant, Congress acted unwisely in requiring them to be done. But whether they are important or not, is not for the court to determine, but the legislature; and in what light they were considered by the legislature we can learn only by their official acts. Judging, then, of these acts by this rule, we are not at liberty to say they are unimportant and may be dispensed with. They are acts which the law requires to be done, and may this court dispense with their performance? But the inquiry is made, shall the non-performance of these subsequent conditions operate as a forfeiture of the right? The answer is, that this is not a technical grant of precedent and subsequent conditions. All the conditions are important; the law requires them to be performed, and, consequently,

their performance is essential to perfect title. \* \* \* The rule by which conditions, precedent and subsequent, are construed, in a grant, can have no application to the case under consideration, as every requisite in both acts is essential to the title." Accordingly, the case was remanded to the circuit court to order an issue of fact to be tried by a jury, to determine whether, within two months after recording the title in the clerk's office, a copy of the record thereof was published in one or more newspapers for four weeks; and whether a copy was delivered to the Secretary of State after publication, in the manner prescribed.

<sup>12</sup> *Parkinson v. Laselle*, 3 Sawy., 330.

<sup>13</sup> *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. Rep. 177. The contrary doctrine had been held in *Baker v. Taylor*, 2 Blatch., 82.

<sup>14</sup> *Low v. Routledge*, 33 L. J. N. S. Ch., 717; *Mathieson v. Harrod*, L. R. 7 Eq., 270.

cation under the English statute, unless he has duly registered it in accordance with the provisions of the act.<sup>15</sup> And it would seem, under the English copyright acts, that the protection afforded by the statute extends only from the first publication, and not from the registration of the title.<sup>16</sup>

§ 991. **When title protected.** The right which is secured and protected by the copyright law being the property in the literary composition itself, that is, the property in the product of the mind and genius of the author, and the title of the work being ordinarily a mere appendage, equity will not interfere by injunction for the protection of a title alone, separate and distinct from the book itself of which it forms a part or an appendage.<sup>17</sup> Where, however, one publishes a

<sup>15</sup> *Murray v. Bogue*, 1 Drew., 353.

<sup>16</sup> *Correspondent Newspaper Co. v. Saunders*, 12 L. T. N. S., 540.

<sup>17</sup> *Osgood v. Allen*, 1 Holmes, 185; *Jollie v. Jaques*, 1 Blatch., 627. *Osgood v. Allen* was an action to enjoin defendant from the use of the words, "Our Young Folks," as the title of a publication in which plaintiff claimed copyright, he having published a copyrighted periodical under that name, and defendant publishing a periodical under the name, "Our Young Folks' Illustrated Paper." The relief was denied under the copyright laws, the question whether plaintiff's title might be protected as a trade mark being reserved until the master's report upon that point. Shepley, J., says, p. 192: "By the plain terms of the statute the copyright protected is the copyright in 'the book,' the word 'book' being used to describe any literary composition. Although a printed copy of the title of such

book is required, before the publication, to be sent to the Librarian of Congress, yet this is only as a designation of the book to be copyrighted; and the right is not perfected under the statute until the required copies of such copyrighted book are, after publication, also sent. It is only as a part of the book, and as a title to that particular literary composition, that the title is embraced within the provision of the act. It may possibly be necessary in some cases, in order to protect the copyrighted literary composition, for courts to secure the title from piracy, as well as the other productions of mind of the author in the book. The right secured by the act, however, is the property in the literary composition, the product of the mind and genius of the author, and not in the name or title given to it. The title does not necessarily involve any literary composition; it may not be, and certainly the stat-



book under a particular name or title, the name forming a part of the book, it has been held proper to enjoin another person from using the same name.<sup>18</sup> And a title may be protected by injunction against a fraudulent or colorable imitation, made with intent to deceive the public and to mislead them into buying defendant's publication, under the belief that it is that of plaintiff, the relief, however, in such cases being granted upon general principles of equity and independent of copyright.<sup>19</sup> But where the variation between

ute does not require that it should be, the product of the author's mind. It is not necessary that it should be novel or original. It is a mere appendage, which only identifies, and frequently does not in any way describe the literary composition itself, or represent its character. By publishing in accordance with the requirements of the copyright law a book under the title of the life of any distinguished statesman, jurist or author, the publisher could not prevent any other author from publishing an entirely different and original biography under the same title. When the title itself is original, and the product of the author's own mind, and is appropriated by the infringement, as well as the whole or a part of the material composition itself, in protecting the other portions of the literary composition courts would probably also protect the title. But no case can be found, either in England or this country, in which under the law of copyright courts have protected the title alone, separate from the book which it is used to designate. In *Jollie v. Jaques*, 1 Blatch., 627, Mr. Justice

Nelson says: "The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it as certainly as the principal carries with it the incident." The only doubt expressed by Mr. Justice Nelson in that case is as to how the question might be decided in case of a valid copyright of a book and an infringement of the title by defendant. While expressing no opinion upon this question, the reasoning by which he arrives at the conclusion that when the book fails to be protected the title goes with it, would seem clearly to point to a similar result in a case of alleged infringement of the copyright of the book, namely: that if there was no piracy of the copyrighted book, there could be no remedy under the act for the use of a title which could not be copyrighted independently of the book."

<sup>18</sup> *Weldon v. Dicks* 10 Ch. D., 247. See *Bradbury v. Beeton*, 39 L. J. Ch. N. S., 57. See also *Mack v. Petter*, L. R. 14 Eq., 431.

<sup>19</sup> *Chappell v. Sheard*, 2 Kay & J., 117; S. C., 1 Jur. N. S., 996, 3

the published and copyrighted title to a work such as a play is so material as to render the identity of the two doubtful and is calculated to lead to the belief that they refer to different works, equity will not afford relief by injunction.<sup>20</sup>

§ 992. **Right incorporeal; purchaser of plate enjoined from printing therefrom.** It is also to be observed that the right of the author which is protected by the copyright law is an incorporeal right existing entirely independent of the mechanical appliances for producing the given publication. Thus, the ownership of the plate upon which a map is printed by the owner of the copyright does not carry with it the right of printing and publishing the map itself, the incorporeal right of the author, that is his copyright, subsisting wholly independent of the plate upon which the map is printed. Where, therefore, such plate is sold on execution, the purchaser is not at liberty to print maps therefrom, and the owner of the copyright may, notwithstanding such sale of the plate, enjoin the sale of maps printed therefrom by the purchaser; since the copyright in the map and the plate upon which the map is printed are distinct subjects of property, each capable of existing and of being transferred independent of the other.<sup>21</sup>

§ 993. **Absolute originality in plaintiff's work not essential; verbatim reproduction not necessary.** As regards the nature of the work which it is sought to protect by injunction, it is not essential that absolute originality should be shown, and equity may lend its aid for the protection of a book which is drawn from common sources of information. Thus, the author of a work of a scientific nature, such as a treatise upon grammar, who takes existing materials from common

W. R., 646; *Chappell v. Davidson*,  
2 Kay & J., 123; S. C. on appeal,  
8 DeG., M. & G., 1; *Matsell v. Flanagan*, 2 Ab. Pr. N. S., 459. And see,  
*post*, § 1045.

<sup>20</sup> *Daly v. Brady*, 39 Fed., 265.

<sup>21</sup> *Stevens v. Gladding*, 17 How., 447.

sources open to all writers and arranges and combines them in a new form, giving them an application which was unknown before and exercising selection, arrangement and combination in producing his work, is entitled to the aid of equity to restrain an infringement. And where, in such a case, the author of the work which it is sought to enjoin, instead of going to the original sources of information which are open and common to all, contents himself with copying from and adopting the plan of plaintiff's book, a proper case is presented for relief by injunction.<sup>22</sup> Upon similar principles it is held where defendant, in the preparation of a dictionary, has made considerable use of plaintiff's dictionary in common with others, but has also bestowed his own labor upon his book and has produced a new result and a different work from that of plaintiff, by the use of his own mental labor, and where there is nothing tending to show any fraudulent design upon the part of defendant to make an unfair use of plaintiff's work, that an injunction should not be allowed.<sup>23</sup> Upon the other hand, it is not necessary, in order to entitle the plaintiff to relief by injunction, that the matter stolen by defendant be reproduced *verbatim*, if in fact there has been an appropriation whereby defendant is making use of plaintiff's work and labor.<sup>24</sup>

<sup>22</sup> *Greene v. Bishop*, 1 Clif., 186.

<sup>23</sup> *Spiers v. Browne*, 6 W. R., 352.

<sup>24</sup> *West Publishing Co. v. Lawyers C. P. Co.*, 25 C. C. A., 648, 79 Fed., 756, 35 L. R. A., 400. In this case, Lacombe, J., uses the following language: " \* \* \* It is not the law that a copyrighted syllabus can be infringed only by a reproduction of its original language. It is the unfair appropriation of the labor of the original compiler that constitutes the offense. Identity of language will often prove

that the offense was committed, but it is not the sole proof; and, when the offense is proved, relief will be afforded, irrespective of any similarity of language. For example, if, in a case like this, defendant's editors should one and all testify that they made up their digest from complainant's syllabi, so as to save the time and trouble necessarily involved in an independent examination of each opinion, there can be no doubt that such digest would be held to in-

§ 994. **Subsequent writer must go to common sources; city directories; financial reports; catalogues.** It is a fundamental principle of the law of copyright that, although the sources from which an author derives his information and procures the material for his literary work are public and open to all writers in common, a subsequent writer is not, therefore, justified in availing himself of the labors of his predecessor in the same field, and making a servile or colorable imitation of his work, but must himself go to the original sources of information which are common to all.<sup>25</sup> This doctrine is especially applicable to such works as business or city directories, the information necessary for their preparation being open to all, yet a subsequent compiler being restrained from a servile imitation or use of the labors of his predecessor in the same field; and the preventive jurisdiction of equity in this class of cases is freely exercised.<sup>26</sup> Where, therefore, de-

fringe, although the work were so cleverly done that no identity of language could be found in a single paragraph."

<sup>25</sup> Drone on Copyright, 416, 417; Farmer v. Elstner, 33 Fed., 494.

<sup>26</sup> Kelly v. Morris, L. R. 1 Eq., 697; Kelly v. Hooper, 1 Y. & C. C., 197; Morris v. Ashbee, L. R. 7 Eq., 34; Matthewson v. Stockdale, 12 Ves., 270; Williams v. Smythe, 110 Fed., 961. Matthewson v. Stockdale was a bill for an injunction to restrain an infringement of the copyright of an East India calendar or directory, on the ground that the variations from the original were merely colorable. It being objected that the work was not susceptible of copyright, Lord Erskine, in granting the injunction, said that in the case of Dr. Trusler's chronology, "all the remarkable events, the accounts of emi-

nent persons, every matter of curiosity and interest, were subjects of information past and gone by, which could not be altered. All human events are equally open to all. Dr. Trusler finally had the decision in his favor. The next was a case of a map. How is it possible to have a copyright in the Island of St. Domingo? Must not the mountains have the same position, the rivers the same course? The answer was that the subject of the plaintiff's claim was a map, made at great expense, from actual surveys. The defendant's map was a servile imitation. In the case of the chart of the English Channel, must not the latitude and longitude of the several points upon the adjoining shores and the soundings be the same as they were placed by nature? They must be the same, or the chart must de-

defendant has not compiled or prepared his directory by the legitimate application of his own labor and original investigation, but has merely made a servile use of plaintiff's work, he is guilty of such an infringement as will be restrained by injunction, since the fact that the information is public to all inquirers will not justify defendant in availing himself of plaintiff's labor for the purpose of saving himself the trouble and expense of procuring the same information from the original sources.<sup>27</sup> And the injunction will go in such case, even though defendant has partially verified the materials taken from plaintiff's directory by personal investigation.<sup>28</sup> So when defendant in the preparation of a business or trades directory of a city, uses plaintiff's directory as the source from which to compile material parts of his own, making the results arrived at by plaintiff the foundation of a material portion of his own book, sufficient cause is presented for an injunction. And in such case, the fact that certain persons had paid plaintiff for the insertion of their names in conspicuous letters in his directory, or with added or extra lines, does not render the names thus inserted common property or sanction their use by defendant in his directory.<sup>29</sup> So the publisher and proprietor of a directory may enjoin the sale of an almanac, the principal part of which is taken from plaintiff's directory, although the matter thus taken by defendant consists of information concerning the post office, which might be obtained by any person applying for the same. And the injunction

stroy the mariner. What room then can there be for originality? That may be a reason for not making a new chart, but it is no reason for a servile imitation."

<sup>27</sup> *Kelly v. Morris*, L. R. 1 Eq., 697; *Williams v. Smythe*, 110 Fed., 961.

<sup>28</sup> *Kelly v. Morris*, L. R. 1 Eq.,

697; *Morris v. Ashbee*, L. R. 7 Eq., 34.

<sup>29</sup> *Morris v. Ashbee*, L. R. 7 Eq., 34. But the court refused to extend the injunction to advertisements which appeared at the end or upon separate pages of plaintiff's work, as distinct from the list of names in the body of the work,

is proper in such case, although the matter pirated forms but a small part of plaintiff's work, when it bears a large proportion to the whole of defendant's book.<sup>30</sup> And an annual publication of the credit ratings and financial standing of persons in a certain line of business will be protected by injunction although its preparation requires industry merely and it is in no sense a literary production; and where a part of the defendant's work is stolen from plaintiff's publication, it is no defense that there was original work done by the defendant as well as work in the way of corrections.<sup>31</sup> But where plaintiff was engaged in the manufacture and sale of certain unpatented articles and had published an illustrated catalogue of such goods which was copyrighted, and defendant had manufactured the same articles from designs taken from plaintiff's catalogue and had himself made a catalogue of his goods which greatly resembled plaintiff's, it was held that since the articles were not patentable, defendant had the right to manufacture and sell them and consequently to publish an illustrated catalogue describing them, and relief by injunction was accordingly denied.<sup>32</sup> And a price catalogue which merely contains cuts and illustrations of the plaintiff's goods with a brief description of the dimensions and prices of the articles and which is entirely devoid of any artistic or literary merit, is not entitled to

<sup>30</sup> *Kelly v. Hooper*, 1 Y. & C. C. C., 197. But in *Morris v. Wright*, L. R. 5 Ch., 279, the court inclined to the opinion that the compiler of a city directory might use slips cut from plaintiff's directory for the purpose of directing him to the persons from whom the information was to be obtained; in other words, that the use by defendant of plaintiff's book as a guide to the persons on whom he should call

in the preparation of his directory, and for no other purpose, was a legitimate use which would not be restrained. But it may well be doubted, in the light of the principles stated in the text, whether such relaxation of the doctrine can be supported either upon principle or authority.

<sup>31</sup> *Ladd v. Oxnard*, 75 Fed., 703.

<sup>32</sup> *Lamb v. Grand Rapids School F. Co.*, 39 Fed., 474.



protection under the copyright laws and an injunction will therefore be denied.<sup>33</sup>

§ 995. **Work partly mechanical protected; printed diary; entirely mechanical, relief denied.** It is not essential that the work for which protection is invoked should be of a strictly literary nature, and relief has been allowed against the piracy of copyright in a production partly literary and partly mechanical. Thus, where plaintiff's publication consisted of a printed diary interleaved with blank sheets so arranged as to give a blank space for writing opposite each day in the diary, and underneath each date a verse of Scripture, to which work plaintiff had given a particular name, defendant was enjoined from publishing and selling a book which was a mere colorable imitation of that of plaintiff.<sup>34</sup> Where, however, the device is entirely mechanical and without any literary characteristics, the relief will be denied. Thus, an index attached to a device for the storage of letters and papers for the purpose of facilitating in keeping and locating them is not a proper subject for copyright and will not be protected by injunction.<sup>35</sup> So a label affixed to an article containing words which are merely descriptive of the article is not a proper subject of copyright and its infringement will therefore not be enjoined.<sup>36</sup>

§ 996. **Statistical tables; acknowledging source.** Where defendant's book consists of statistical tables taken bodily from plaintiff's work, without the exercise of that labor which plaintiff had himself used in producing the tables originally, such use will not be regarded as a fair and legitimate use of the labors of a predecessor in the same field, but will be treated as an infringement for which an injunction will lie.

<sup>33</sup> *Mott Iron Works v. Clow*, 27 C. C. A., 250, 83 Fed., 316, 53 U. S. App., 461.

<sup>34</sup> *Mack v. Petter*, L. R. 14 Eq., 431.

<sup>35</sup> *Amberg F. & I. Co. v. Smith & Co.*, 27 C. C. A., 246, 82 Fed., 314, 53 U. S. App., 449.

<sup>36</sup> *Higgins v. Keuffel*, 140 U. S., 428, 11 Sup. Ct. Rep., 731.

And in such a case, the fact that defendant gives full and complete acknowledgment in his book of the source from which such statistics are drawn will not avail against the granting of an injunction, since the court can only look at the result of the infringement as affecting the property right of plaintiff, and not upon defendant's motive or intention.<sup>37</sup> And when defendant's book has been made largely by taking the actual words as they stand in plaintiff's work, an injunction will be allowed.<sup>38</sup>

§ 997. **Effect of contract between author and publisher.** The nature of plaintiff's right and the extent to which it is entitled to protection are frequently dependent upon the contract relations or obligations which he may have assumed, and in such cases reference must be had to the contract in determining whether a proper case for relief by injunction is shown. Thus, where an author enters into a verbal agreement with a publisher for the publication of his book at the author's expense, he being reimbursed by a royalty upon the sales, but there being no transfer of the

<sup>37</sup> Scott v. Stanford, L. R. 3 Eq., 718. Vice Chancellor Wood observes, p. 723: "It is urged that this is a case in which no *animus furandi* can be found on the part of Mr. Hunt, who has taken these statistics in perfect good faith, and with the fullest acknowledgment in his book of the sources from which they are derived. But if, in effect, the great bulk of plaintiff's publication, a large and vital portion of his work and labor, has been appropriated and published in a form which will materially injure his copyright, mere honest intention on the part of the appropriator will not suffice, as the court can only look at the result, and not at the intention in the man's mind

at the time of doing the act complained of, and he must be presumed to intend all that the publication of his work effects. \* \* \* The defendant, after collecting the information for himself, might have checked his results by the plaintiff's tables, but that is a widely different thing from this wholesale extraction of the vital part of his work. No man is entitled to avail himself of the previous labors of another for the purpose of conveying to the public the same information, although he may append additional information to that already published."

<sup>38</sup> Stevens v. Wildy, 19 L. J. N. S. Ch., 190.

copyright and no agreement with the publisher of an exclusive nature, or restricting the author from publishing another edition, an injunction will not lie to prevent the author from publishing another edition until such publisher shall have sold all of his copies.<sup>39</sup> And where a contract was entered into between an author and publishers/whereby the latter were to print a first edition of a given number of copies, and to print as many copies of a second edition, if called for, as they could sell, and the publishers printed such second edition, and afterward printed from the same plates what they called a third edition, the court, construing the contract to authorize them to print as many as they could sell, refused to enjoin them from further printing or publishing; and also refused, upon a cross-bill by defendants, to enjoin the author from publishing a revised edition of the work.<sup>40</sup>

§ 998. **Restrictive covenant by author.** It is also held, where plaintiffs purchase the copyright in a periodical published by defendant, with the right to use his name in connection therewith, or with any of their present or future publications, he agreeing to give his entire time and services in and about such publication, and not to engage in any other business without plaintiff's consent, or to permit the use of his name for any other publication without their consent, that an injunction will lie to prevent defendant from advertising or announcing the publication of a rival work without plaintiff's

<sup>39</sup> *Warne v. Routledge*, L. R. 18 Eq., 497.

<sup>40</sup> *Pulte v. Derby*, 5 McLean, 328. It is difficult to ascertain from the opinion the exact grounds of the decision, or whether the case did not go off upon a question of jurisdiction; since the court discuss the question of jurisdiction, and ex-

press the opinion that, the controversy being solely with reference to the construction of the contract between the parties, and not a controversy arising under the act of Congress relating to copyrights, the United States circuit court had no jurisdiction.

consent.<sup>41</sup> Where, however, plaintiff had purchased of defendant the copyright of a treatise upon criminal law written by defendant, who undertook not to write or edit any other work upon that subject, an advertisement having appeared announcing that defendant was about to edit a book called "Burn's Justice," the court refused to enjoin him from editing such of the articles in that work as related to the criminal law; the refusal being based upon the ground that defendant was at liberty to write what he pleased, until there was a violation of the agreement by actual printing and publication.<sup>42</sup>

§ 999. **Artist in government employ.** As still further illustrating the effect to be given to the contract obligations of one who seeks protection under the copyright laws, it is held that one who accompanies a government expedition, in the employ of the government for the purpose of making drawings and sketches, under an agreement that such drawings shall be the exclusive property of the government, the results of his labors being published by the government in a report of the expedition, can not procure a copyright thereon as his individual property, and can not enjoin the publication of such sketches by a publisher. Even if plaintiff, in such a case, could obtain a copyright for his sketches, yet when he has aided defendants in the publication of their work, being employed and paid by them to prepare some of their prints for publication, and making no claim of copyright therein, he can not afterward enjoin defendants from such publication.<sup>43</sup>

<sup>41</sup> Ward v. Beeton, L. R. 19 Eq., 207.

<sup>42</sup> Brooke v. Chitty, 2 Coop. t. Cottenham, 216.

<sup>43</sup> Heine v. Appleton, 4 Blatch., 125. Ingersoll, J., says, p. 128:

"At a subsequent period the plaintiff was employed by the defendants to reduce several drawings from the size of the quarto edition to that of the octavo edition, for which services he was paid by the

§ 1000. **Copy of painting; living pictures; engravings; etchings; photographs; topical songs; fancy dance.** The unauthorized copying of a painting by taking photographs therefrom and selling them constitutes such a violation of the common law right of the owner as to warrant relief by injunction. And in such a case, the fact that the owner has previously consented to and permitted the publication in a magazine of an engraving from the painting does not constitute such a publication as to prevent relief in equity. Nor does the exhibition of the painting at a public gallery or for the purpose of obtaining subscribers amount to such publication as will bar the right to relief by injunction.<sup>44</sup> But the publication of sketches of living pictures which represent the scenes of copyrighted paintings owned by plaintiff constitutes no infringement of the copyright and will therefore not be enjoined.<sup>45</sup> Nor does the production of the living pictures themselves constitute an infringement and relief in such case will likewise be denied.<sup>46</sup> And the exhibition of a diorama copied on a large scale from plaintiff's print or engraving has been held not to be sufficient ground to warrant an injunction

defendants, and there is no complaint that he never was paid. The plaintiff thus aided in the publication of some of the works of the defendants. When he thus aided in their publication he made no claim of copyright. It would be inequitable now to permit him, when he has been paid to aid in their publication and sale, and has thus aided in their publication with a view to their sale, to stop their sale even if he had a valid copyright in them. By aiding in their publication he agreed to their publication; and by agreement

that they might be published he agreed that they might be sold; and he can not now, with success, ask that the defendants may be restrained from doing that which he has agreed they may do. The motion for the preliminary injunction must, therefore, be denied."

<sup>44</sup> *Turner v. Robinson*, 10 Ir. Ch., 121.

<sup>45</sup> *Hanfstaengl v. Baines*, App. Cas. (1895), 20, 64 L. J. N. S. Ch., 81; *Hanfstaengl v. Empire Palace*, 63 L. J. N. S. Ch., 681.

<sup>46</sup> *Hanfstaengl v. Empire Palace*, 63 L. J. N. S. Ch., 417.

until plaintiff's right could be established at law.<sup>47</sup> Where, however, plaintiff has made drawings and etchings and has printed impressions of them for his own private use and pleasure, not intending them for publication, and defendants surreptitiously obtain them and publish a catalogue for sale, an injunction will be allowed against such publication. And in such case the right to relief rests upon the double ground of an exclusive property in plaintiff with no right or interest in defendants, and upon the ground of a breach of trust or confidence in obtaining possession of the etchings; and the injunction is proper, under such circumstances, without a trial of the right at law.<sup>48</sup> And upon similar grounds, a photographer, who has taken photographs for a customer in the usual course of business, retaining the negative in his possession, may be restrained from selling or exhibiting for sale, without the customer's consent, copies of such photographs.<sup>49</sup> And a photograph of a person posed in such a manner by the photographer as to produce what, in his judgment, amounts to artistic merit is subject to copyright and will accordingly be protected by injunction.<sup>50</sup> And a so-called comic topical song is held to come within the provisions of the copyright act and the appropriation of a substantial and material part of it will therefore be enjoined.<sup>51</sup> But a dance consisting of a series of graceful movements combined with an attractive arrangement of draperies, lights and shadows but telling no story and portraying no character, is not subject to protection by copyright and its infringement will therefore not be enjoined.<sup>52</sup>

<sup>47</sup> *Martin v. Wright*, 6 Sim., 297.

<sup>48</sup> *Prince Albert v. Strange*, 1 Mac. & G., 25; S. C., 2 DeG. & Sm., 652.

<sup>49</sup> *Pollard v. Photographic Co.*, 40 Ch. D., 345.

<sup>50</sup> *Falk v. Gast Lithograph Co.*,

<sup>48</sup> Fed., 262, affirmed in 4 C. C. A., 648, 54 Fed., 890; *Falk v. Brett Lithographing Co.*, 48 Fed., 678; *Falk v. Donaldson*, 57 Fed., 32.

<sup>51</sup> *Henderson v. Tompkins*, 60 Fed., 758.

<sup>52</sup> *Fuller v. Bemis*, 50 Fed., 926.

§ 1001. **English copyright includes illustrations.** Under the English statute,<sup>53</sup> it is held that where there are designs or illustrations forming part of a book in which plaintiff has a copyright, such copyright extends to the illustrations as well as to the letter-press; and plaintiff may, therefore, have an injunction to restrain defendant from publishing copies of such designs, although defendant's letter-press is different from that of plaintiff and is original. And the relief will be allowed in such a case, although plaintiff has not copyrighted his designs as such under the statute; since the book includes every design, print or engraving which forms a part of it, as well as the letter-press.<sup>54</sup>

§ 1001 *a*. **Where report of speech protected.** Under the same statute,<sup>55</sup> it is held that where a newspaper has had its reporters take down in short-hand speeches delivered before public audiences upon public questions which it has afterward had written up and published in its paper, together with an account of the meetings and of the speeches, the proprietors acquire an exclusive right to the publication of such speeches against one who is proceeding to publish them by copying *verbatim* from plaintiff's newspaper, and an injunction will therefore lie to restrain such infringement.<sup>56</sup>

§ 1001 *b*. **Publication of report prepared by employee of census office.** A subordinate employee of the census office who has compiled a report or bulletin upon the subject of the Indian tribes to be used in connection with the census has no such property right in such report as will enable him to enjoin the head of the department from revising and re-

<sup>53</sup> 5 and 6 Vict., Ch. 45.

<sup>55</sup> 5 and 6 Vict., Ch. 45.

<sup>54</sup> *Bogue v. Houlston*, 5 DeG. & Sm., 267.

<sup>56</sup> *Walter v. Lane*, App. Cas. (1900), 539.



arranging such report and from publishing it with his own name attached to it in the revised form.<sup>57</sup>

§ 1002. **Law reports protected by injunction in England.** The question whether there may be such literary property in the work of a reporter who prepares and publishes the reports of judicial decisions of the courts as to entitle him to a copyright therein, and to the protection of equity by enjoining an infringement upon his work, seems to be settled in the affirmative in England; and there are repeated instances of relief by injunction in such cases in that country.<sup>58</sup> Thus, where plaintiff and defendant were proprietors of two rival legal publications or journals, each of which contained, among other things, reports of cases at law and in equity reported by members of the bar under verbal agreements with the proprietors, plaintiff's journal being copyrighted, they were allowed an injunction to restrain defendant from printing or selling any copies of his journal containing their reports.<sup>59</sup> It is, however, to be observed with reference to the English decisions upon this subject, that the English law reports have been in modern times wholly the result of private enterprise, there having been no official reports of the courts since the year books, the reporters of which were employed and paid by the crown. The work of the reporter, therefore, under such circumstances, being purely of a private nature, and not performed by him in the discharge of a public duty, or in the capacity of a public officer, no satisfactory reason can be perceived why, upon principle as well as authority, his reports should not be subject to copyright and entitled to protection by injunction.

<sup>57</sup> *Donaldson v. Wright*, 7 App. D. C., 45. also *Butterworth v. Robinson*, 5 Ves., 709.

<sup>58</sup> *Sweet v. Shaw*, 1 Jur., 917; <sup>59</sup> *Sweet v. Maugham*, 11 Sim., 51. *Sweet v. Maugham*, 11 Sim., 51. See

§ 1003. **The American doctrine.** In this country, the tendency of the courts has long been toward a recognition of the right of a reporter of judicial decisions to literary property and a copyright in his reports, and to judicial protection against an infringement of that right.<sup>60</sup> And the doctrine is now definitely and finally established by the Supreme Court of the United States that, in the absence of any legislation reserving a copyright to the state, an official reporter is entitled to copyright his work under the act of Congress, and to protection by injunction against its piracy.<sup>61</sup> The doctrine thus established extends to a reporter the same relief as to any other author, and his right to protection under the act of Congress governing copyrights, and to relief by injunction, is now too well established to admit of controversy.<sup>62</sup> Upon principle, however, it is difficult to perceive

<sup>60</sup> See *Little v. Hall*, 18 How., 165; *Backus v. Gould*, 7 How., 798; *Paige v. Banks*, 13 Wal., 608, affirming S. C., 7 Blatch., 152; *Chase v. Sanborn*, 6 Pat. Off. Gazette, 932; *Banks v. McDivitt*, 13 Blatch., 163.

<sup>61</sup> *Callaghan v. Myers*, 128 U. S., 617, 9 Sup. Ct. Rep., 177. And see the opinion of the court in this case as to the extent of matter prepared by the reporter which may be covered by copyright.

<sup>62</sup> *Callaghan v. Myers*, 128 U. S., 617, 9 Sup. Ct. Rep., 177. The criticism expressed in the text upon the doctrine of protection to an official reporter in the product of his official labors is strengthened by the earlier English decisions, during a period when the publication of the laws was claimed as an attribute of sovereignty, and when the exclusive right to their publication was granted under letters

patent from the crown. Such patents appear to have been granted from a very early date, and in *The Company of Stationers v. Seymour*, 1 Mod., 257, decided in 1677, the court say: "And particularly the sole printing of law books has been formerly granted in other reigns. \* \* \* Queen Elizabeth, King James and King Charles the First granted such patents as these, and the law has great respect to common usage." The case of *The Stationers v. The Patentees*, decided in 1666, is an instructive case in point. A patent had been granted by James I. in 1608 for printing law books, which finally vested in one Atkins. The Company of Stationers printed Roll's Abridgment and Atkins obtained an injunction in chancery to restrain the printing. On appeal to the House of Lords, it was argued by counsel for the patentee that "The King hath a

any satisfactory reason for extending the protection of the copyright laws to an official reporter, occupying the position of a public officer, and paid by the state or government for his labor in reporting the opinions of the courts. That

particular prerogative over law books, and so he would have had if the art of printing had never been known. The reasons are, first, all the laws of England are called the King's laws, etc.; second, the salaries of the judges are paid by the King; and reporters in all courts at Westminster were paid by the King, formerly." And the Lords sustained the patentee under the King's grant. Carter, p. 89; Bac. Abridg., title Prerogative, F. 5. The case of *Roper v. Streater*, decided in 1672, is also in point. Roper had bought of the executors of Mr. Justice Croke the third part of his reports, which he then printed. Streater held a grant from the crown for printing all law books, and Roper brought an action against him for printing without authority. Streater pleaded the King's grant, to which Roper demurred, and there was judgment for the plaintiff, holding the King's grant not good. But the House of Lords reversed the judgment on writ of error, upon the following, among other grounds: that the privilege of granting patents by the King for the printing of law books had always been allowed; that it concerned the state, and was a matter of public care; and that the King had the making of judges, sergeants and officers of the law. Skinner, 234; Bac. Abridg., title Prerogative, F. 5.

English authorities differ as to the foundation of the right of the sovereign as thus asserted over the publication of the laws, there being two theories upon which the right has been based: first, that it is dependent upon an absolute property in the crown as the head of the state; and, second, that it is a branch of the royal prerogative. Lord Mansfield adhered to the former theory, and in the great case of *Millar v. Taylor*, 4 Burr. 2404, decided in 1769, referring to *Basket v. University of Cambridge*, 1 W. Black., 105, in which the King's Bench had upheld the doctrine of the exclusive right of the crown to publish the laws of the realm, he says: "We rested upon property from the king's right of original publication. Acts of parliament are the works of the legislature; and the publication of them has always belonged to the king as the exclusive part and as the head and sovereign."

Upon the other hand, Mr. Justice Yates, in *Millar v. Taylor*, 4 Burr., 2383, asserted in strong terms the prerogative theory as the basis of the right in question. "Upon the whole of this prerogative claim of the crown," he observes, "it appears to me that the right of the crown to the sole and exclusive printing of what is called prerogative copies, is founded on reasons of religion or of state. The

such a reporter is not entitled to copyright in the opinions of the judges, or to protection by injunction as to such opinions, is clear.<sup>63</sup> Nor can he acquire any copyright in the head notes of the cases when prepared by the judges, nor obtain relief by injunction against their piracy.<sup>64</sup> And the reason for this is found in the fact that the judges being public officers, employed and paid by the people whom they serve, the opinions delivered by them in the discharge of their official duty are public property, and are not, therefore, subject to copyright, unless in the name of for the benefit of the public, whose property they are. That, upon principle, the same doctrine should govern as regards the work of an official reporter, would seem to be clear. But

only consequences to which they tend are of a national and public concern, respecting the established religion or government of the kingdom; and have no analogy to the case of private authors."

Lord Chancellor Lyndhurst, in *Manners v. Blair*, 3 Bligh, N. S., 402, which was a case involving a patent from the crown of the exclusive printing of bibles, also adopts the prerogative theory, and attributes the power of the crown over the publication of the laws and of the bible, "to the character of the duty imposed upon the chief executive officer of the government to superintend the publication of the acts of the legislature, and acts of state of that description, and also of those works upon which the established doctrines of our religion are founded—that it is a duty imposed upon the first executive magistrate, carrying with it a corresponding prerogative."

Whether the theory of the royal

prerogative, or that of a private property in the crown, be accepted as the foundation of this exclusive right of publishing the laws of England, the application by analogy to the publication of law reports is certainly a striking one, and one which has generally been overlooked. In view, however, of the doctrine of the Supreme Court in *Callaghan v. Myers*, 128 U. S., 617, 9 Sup. Ct. Rep. 177, already noted, the subject is chiefly interesting in a historical rather than in a practical view.

<sup>63</sup> *Wheaton v. Peters*, 8 Pet., 591. "It may be proper to remark," say the court, p. 668, "that the court are unanimously of opinion that no reporter has, or can have, any copyright in the written opinions delivered by this court, and that the judges thereof can not confer on any reporter any such right."

<sup>64</sup> *Chase v. Sanborn*, 6 Pat. Off. Gazette, 932.

although the opinions of the judges are not susceptible of copyright, yet where, under a contract with the proper state officers, made under the laws of the state, a publisher is entitled to the exclusive benefit of the copyright of the notes, references and other matters susceptible of copyright, in the reports of the state, equity will enjoin other publishers from infringing upon this right. And this will be done even though the copyright be taken in the name of the state. Even an acknowledgment of the extracts in such case affords no justification for the piracy.<sup>65</sup> Where the reports of the decisions of courts are prepared and published by purely private enterprise as distinguished from those which are put out by an official reporter, the criticism above made can have no application, and relief by injunction is properly granted in such cases. Thus, the proprietors of the so-called "Reporters" are entitled to an injunction to restrain defendant from publishing a digest of reported decisions containing matter which, in many instances, has been appropriated either directly or with mere colorable changes from the syllabi of plaintiff's copyrighted reports.<sup>66</sup>

§ 1004. **Doctrine as to extracts.** As regards the nature and extent of the infringement which will warrant relief by injunction, it is held that a fair extract from plaintiff's publication, used for purposes of criticism, does not constitute such a piracy of plaintiff's literary property as to warrant an injunction.<sup>67</sup> But if so much of the original is taken as to sensibly diminish its value, or if there is a substantial and injurious appropriation of complainant's labors, the relief will be allowed.<sup>68</sup> So the proprietor of a newspaper may be enjoined from publishing in his paper copious extracts from

<sup>65</sup> *Little v. Gould*, 2 Blatch., 165.

<sup>67</sup> *Bell v. Whitehead*, 3 Jur., 68.

<sup>66</sup> *West Publishing Co. v. Lawyers C. P. Co.*, 25 C. C. A., 648, 79 Fed., 756, 35 L. R. A. 400.

<sup>68</sup> *Folsom v. Marsh*, 2 Story's R., 100; *Walter v. Steinkopff*, 61 L. J. N. S. Ch., 521.

a novel which are copied without criticism.<sup>69</sup> And it is not necessary, to warrant the interference of equity, that defendant's work should be a substitute for complainant's. It is only required that so much should be abstracted as to sensibly impair and diminish the value of the original.<sup>70</sup>

§ 1005. **Maps and charts; court calendar; insurance maps.** Where the natural objects from which a work is produced are equally open to all, as in the case of a map or chart, the copyright is violated only when a servile imitation is made. In all such cases, absolute originality being of necessity excluded, the compiler may properly make use of preceding works upon the same subjects, by bestowing upon the materials thus taken such mental labor, and subjecting them to such revision as to produce an original result, the alterations being not merely colorable, and the compiler not denying the use made of preceding works.<sup>71</sup>

<sup>69</sup> *Dickens v. —*, cited 8 L. J. Ch. N. S., 141.

<sup>70</sup> *Bohn v. Bogue*, 10 Jur., 420.

<sup>71</sup> *Blunt v. Patten*, 2 Paine, 397; *Farmer v. Calvert* L. E. & M. P. Co., 5 Chicago Legal News, 1. The latter case, decided in the United States Circuit Court for the Eastern District of Michigan, very clearly illustrates the rule laid down in the text. The decision was upon a motion to dissolve a preliminary injunction restraining defendant from the infringement of certain maps of the states of Michigan and Wisconsin. The following observations of the court, Longyear, J., are especially applicable to the point under consideration: " \* \* \* The courts, in the interest of learning and science, have at all times and in all countries recognized the right of sub-

sequent authors, compilers and publishers to use the works of others to a certain extent; but the great difficulty has always been, and always must be, to determine where such use ceases to be legitimate, and becomes an invasion of the rights of others. The difficulty is greatest in cases of maps, and the like, in which there is not, and can not be, any originality in the facts or materials of which they are composed, and which facts and materials are equally open to all. The following rule laid down by Mr. Copinger (*Copinger's Law of Copyright*, 91), comes as near to defining this right as anything I have been able to find or can invent. He says: "The rule appears now to be settled that a compiler of a work in which absolute originality is of necessity excluded, is en-

But the court will interpose to restrain the piracy of a court calendar, the individual work being regarded as a proper subject of copyright, although the general subject as in the case of a chart or map, is open to all.<sup>72</sup> So relief will be granted against the reproduction by defendant with

titled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labor upon what he has taken, and subjects it to such revision and correction as to *produce an original result*; provided, that he does not deny the use made of such preceding works and the alterations are not merely colorable.' To apply this rule to the present case: What mental labor did the defendant bestow upon those portions of the complainant's map admitted to have been taken in the preparation of its own, viz.: the boundaries of the larger townships of Wisconsin? None whatever beyond the mere mechanical operation of reducing them from the larger scale of complainant's to the smaller scale of defendant's map. Neither does it appear that there was any revision whatever to ascertain if there were errors which needed correction, or for any other purpose. There is in fact nothing whatever to bring the case within the rule. So far as those boundaries are concerned it is clearly a case of naked piracy. But it is contended that boundaries of townships are not a legitimate subject of copyright—that they are fixed and defined by statute law, and that the marking of them down upon paper is but a tran-

scription in another form of the legal enactment. What is claimed in this regard is true in regard to all original materials from which maps are made, and that is that none of them are subjects of copyright—they are open to all. But no one has the right to avail himself of the enterprise, labor and expense of another in the ascertainment of those materials, and the combining and arrangement of them, and the representing them on paper. The defendant no doubt had the right to go to the common source of information, and having ascertained those boundaries, to have drawn them upon its map, notwithstanding that in this respect it would have been precisely like complainant's map (which of course it would have been if they were both correct). But he had no right to avail himself of this very labor on the part of complainant in order to avoid it himself. As appears by complainant's affidavit, these boundaries were fixed by the boards of supervisors of the respective counties, and not by legislative enactment, thus showing that the labor must have been much greater than it would have been if such boundaries could have been ascertained from the statutes of the state."

<sup>72</sup> Longman v. Winchester, 16 Ves., 269.

a few minor changes of a set of copyrighted maps prepared by plaintiff showing improvements upon property and the surrounding property as affecting fire risks.<sup>73</sup>

§ 1006. **Nature of selections; their quantity and value.** Although the question as to the originality of the work which it is sought to enjoin generally turns upon the extent to which the materials of the prior publication have been used and the quantity abstracted, yet resort must frequently be had to the nature and objects of the selections, as well as their quantity.<sup>74</sup> And the question of the value of the materials abstracted must also be taken into consideration, since, although the parts taken may comprise but a small portion of the original work in quantity, they may nevertheless constitute its chief value.<sup>75</sup>

§ 1007. **Arrangement; citations; authorities; law books; annotated statutes.** Although one may use the same materials

<sup>73</sup> *Sanborn M. & P. Co. v. Dakin Publishing Co.*, 39 Fed., 266.

<sup>74</sup> *Folsom v. Marsh*, 2 Story's R. 100. The considerations to be observed in determining the question of piracy are stated in this case by Story, J., as follows: "We must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases a considerable portion of the materials of the original work may be fused, if I may use such an expression, into another work, so as to be undistinguishable in the mass of the latter, which has

other professed and obvious objects, and can not fairly be treated as a piracy; or they may be inserted as a sort of distinct and mosaic work into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy. If a person should, under color of publishing 'elegant extracts' of poetry, include all the best pieces at large of a favorite poet, whose volume was secured by a copyright, it would be difficult to say why it was not an invasion of that right, since it might constitute the entire value of the volume."

<sup>75</sup> *Bramwell v. Halcomb*, 3 Myl. & Cr., 738; *Gray v. Russell*, 1 Story's R., 11; *Farmer v. Calvert L. E. & M. P. Co.*, 5 Chicago Legal News, 1.



as his predecessor, and derive them from the same source, yet if, availing himself of his labor, he should adopt his arrangement of those materials, he would be guilty of such an infringement as would warrant the interference of equity, even though the new work should be disguised under a colorable variation from the old.<sup>76</sup> So while extracts may be made for purposes of criticism, comment, review or illustration, if done in good faith, yet if the citations go so far as to supersede the original work, and to substitute therefor the later one, equity may properly interfere.<sup>77</sup> And the true

<sup>76</sup> Jarrold v. Houlston, 3 Kay & J., 708; Hotten v. Arthur, 1 Hem. & M., 603; Gray v. Russell, 1 Story's R., 11.

<sup>77</sup> Wilkins v. Aiken, 17 Ves., 422; Walter v. Steinkopff, 61 L. J. N. S. Ch., 521. In Wilkins v. Aikin, defendant admitted by his answer that he had copied portions of complainant's work, representing them as fair quotation and abridgment, and admitted that he had copied from some of complainant's drawings. He insisted, however, that his work was a distinct work and not merely an abridgment of that of complainant, and that the abridgments and quotations constituted only a small portion of the work. Eldon, Chancellor, says: "The jurisdiction upon subjects of this nature is assumed merely for the purpose of making effectual the legal right, which can not be made effectual by any action for damages; as, if the work is pirated, it is impossible to lay before a jury the whole evidence as to the publications which go out to the world, to the plaintiff's prejudice. A court of equity, there-

fore, acts with a view to make the legal right effectual by preventing the publication altogether; and accordingly in the exercise of this jurisdiction, where a fair doubt appears, as to the plaintiff's legal right, the court always directs it to be tried, making some provision in the *interim*, the best that can be, for the benefit of both parties. There is no doubt that a man can not, under the pretense of quotation, publish either the whole or part of another's work; though he may use, what it is in all cases difficult to define, fair quotation. Difficulties have arisen in cases that have occurred upon which I should have taken the same course by sending them to the consideration of a court of law. In the case of maps, for instance, one man publishes the map of a county; another man, with the same design, if he has equal skill and opportunity, will, by his own labor, produce almost a *fac simile*, and has a right to do so; but from his right through that medium was it ever contended that he might copy the other map? Suppose a publica-

test is to ascertain whether the plan, arrangement and illustrations of the original work have been used with such colorable alterations as to disguise this use, or whether defendant has simply availed himself of the common sources and materials open alike to all.<sup>78</sup> But an author will not be allowed to prohibit a subsequent writer from using the

tion professing to be an account of the improvement of maps of the county of Middlesex, compiling the history of all the maps of it ever published; pointing out the peculiarities belonging to them, and giving copies of them all, as well those, the copyright of which have expired, as those of which it was subsisting; it is not easy to say with certainty what would be the decision upon such a case. If it was a fair history of the maps of the county which had been published, and the publication of the individual map was merely an illustration of that history, that is one way of stating it; but if a jury could perceive the object to make a profit by publishing the map of another man, that would require a different consideration. The slightest circumstances, therefore, in these cases make the most important distinction. So in the case of a book of roads, there is no doubt that, though any man may publish a book of roads that would be precisely the same as Patterson's, yet he can not take that book and copy it. The fair question, therefore, upon such a compilation as this, is whether it is competent to the defendant to publish to the world the plates, which it is admitted he could not publish as copies of the plaintiff's. I have no doubt that

both these parties are actuated by very honorable views. Upon inspection of the different works I observe a considerable proportion taken from the plaintiffs, that is acknowledged; but also much that is not; and in determining whether the former is within the doctrine upon this subject, the case must be considered as also presenting the latter circumstance. The question upon the whole is, whether this is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation, deserving the character of an original work. The effect, I have no doubt, is prejudicial; it does not follow, that therefore there is a breach of the legal right; but where that is so, and there is a fair question, the injunction ought not to be dissolved, but according to the usual course, maintaining the injunction, an action should be brought forthwith. The proper course in this instance will be to permit this work to be sold in the meantime, the defendant undertaking to account according to the result of the action."

<sup>78</sup> *Emerson v. Davies*, 3 Story's R., 793; *Webb v. Powers*, 2 Woodb. & M., 497. And see *Carnan v. Bowles*, 1 Cox, 283; S. C., 2 Bro C. C., 81.

same authorities quoted in his work, even on proof that such authorities were suggested to the later writer by a perusal of the former work. The subsequent writer, however, will not be allowed to copy the quotations or extracts from the earlier work, but he must go to the same sources from which such extracts were drawn; although the use of a single quotation without verification, or of a single argument deduced from the facts stated by the former author, does not constitute such a piracy as calls for the interference of equity.<sup>79</sup> And when it is shown that those portions of defendant's work which are alleged to be a piracy upon that of plaintiff are in fact taken from other works which preceded both publications, it appearing that defendant's writers, although advised of the existence of plaintiff's book and using it in common with others, have gone to independent sources of information, an injunction will be refused.<sup>80</sup> And a copyrighted law book is not infringed where the author of another work upon the same subject has collected all available citations, including those found in the copyrighted work, and, after examining them in text books and reports, has used those which he considers applicable in support of his own original text.<sup>81</sup> And where plaintiff and defendant have each prepared a new edition of a legal text book to which new and original matter has been added, the fact that defendant, in so doing, has inserted in his work a treatment of several subjects which were suggested to him solely by a perusal of plaintiff's work constitutes no infringement where he has not appropriated or copied any part of plaintiff's treatment of those subjects but the new matter thus added to defendant's work has all been the result of his own original research. Nor is the

<sup>79</sup> *Pike v. Nicholas*, 39 L. J. N. S.      <sup>81</sup> *Edward Thompson Co. v. American Law Book Co.*, 59 C. C. A., Ch., 435; S. C., L. R. 5 Ch., 251.

<sup>80</sup> *Jarrold v. Heywood*, 18 W. R., 148, 122 Fed., 922.

copyright infringed in such case by the fact that the defendant has gone to plaintiff's work and has appropriated therefrom a list of the new authorities cited by plaintiff upon the various subjects treated where it appears that the defendant has made an independent investigation of those authorities and his work is the result of such independent research.<sup>82</sup> And the publisher of a set of annotated statutes is entitled to copyright in all those portions which are the result of his own labor and research, such as the digest of the decisions, indices, table of cases and table of contents, and an injunction may accordingly issue to restrain infringement.<sup>83</sup>

§ 1008. **Doctrine as to abridgments.** It has been held that a *bona fide* abridgment is not such a piracy as equity will restrain.<sup>84</sup> This doctrine must, however, be received with many qualifications, and grave doubts have been entertained both in England and in America, of the correctness of the principle.<sup>85</sup> In order to constitute such an abridgment as will not be a piracy, there must at least be a substantial condensation of the materials used by the original author.<sup>86</sup> And if the condensation be merely colorable, as by the omission of certain parts of the work that the remainder may be presented in a smaller compass, it is still a piracy.<sup>87</sup>

§ 1009. **Distinction between compilation and abridgment; piracy of part enjoined.** A distinction has been drawn be-

<sup>82</sup> Mead v. West Publishing Co., 80 Fed., 380.

<sup>83</sup> Howell v. Miller, 33 C. C. A., 407, 91 Fed., 129. In this case relief was finally denied upon the ground that complainant had not established the fact of infringement by sufficiently clear and satisfactory evidence.

<sup>84</sup> Gyles v. Wilcox, 2 Atk., 141; Bell v. Walker, 1 Bro. C. C., 451.

And see Campbell v. Scott, 11 Sim., 31.

<sup>85</sup> Gray v. Russell, 1 Story R., 11; D'Almaine v. Boosey, 1 Y. & C. Exch., 288; Dickens v. Lee, 8 Jur., 184. And see Wheaton v. Peters, 8 Pet., 591.

<sup>86</sup> Folsom v. Marsh, 2 Story R., 107.

<sup>87</sup> Gyles v. Wilcox, 2 Atk., 141; Gray v. Russell, 1 Story R., 11.

tween a compilation and an abridgment, and it has been held that while a fair abridgment may, under certain circumstances, be allowed, yet if the plan and classification of the original work are adopted, and such copious extracts made as to render the new work a mere compilation, equity will interpose. And where part of a book is piracy, and the remaining portions are not, the injunction will be granted against the pirated matter.<sup>88</sup>

§ 1010. **How far compilation protected; abridgment of law reports.** A publication consisting partly of original matter and partly of compilations and selections from former works may be the subject of copyright, and as such entitled to protection in equity. And where a large proportion of defendant's work has been made up from such a publication, with no other labor than that of copying and arranging the matter in such form as suited the compiler, it will be enjoined as an infringement.<sup>89</sup> So upon a bill to enjoin the publication of an abridgment of law reports, the bill alleging defendant's work to be merely a colorable abridgment, omitting some parts of the cases, the chronological order and arrangement of the work being artificially changed to an alphabetical arrangement, under heads and titles, so as to give it the appearance of a new work, an injunction may be allowed.<sup>90</sup>

§ 1011. **Unpublished manuscripts protected.** Closely allied to the jurisdiction of equity in cases of infringement of copyright, is its power to restrain the publication of unpublished manuscripts, the jurisdiction resting upon the same foundation of the prevention of irreparable mischief and vexatious litigation.<sup>91</sup> The author of manuscript treatises having a right of property therein, it is obvious that he is entitled to protection in the enjoyment of such right, even though his

<sup>88</sup> *Story's Ex'rs v. Holcombe*, 4 McLean, 306.

<sup>89</sup> *Butterworth v. Robinson*, 5 Ves., 709.

<sup>90</sup> *Lewis v. Fullarton*, 2 Beav., 6.

<sup>91</sup> 2 *Story's Eq.*, § 943.

manuscripts may be deposited in the possession of a third person with authority to copy them.<sup>92</sup> And where a copy of an unpublished treatise has been granted to another for a particular purpose, other than publication, such a grant may not be construed into a general authority to publish the work, and equity will, under such circumstances, restrain its publication.<sup>93</sup>

§ 1012. **Publication of private letters enjoined.** Equity will also restrain the publication of private letters, on the ground of a right of property in the author, it being held that the receiver of the letters acquires only a special property in them, which does not justify their unauthorized publication. Even though the receiver of the letters be considered in the position of a joint owner with the writer, yet his publication of the letters without the writer's consent is such a violation of the rights of literary property as to warrant the exercise of the strong arm of equity for its restraint.<sup>94</sup> It is to be observed, however, that the interference will not be exercised on the ground of wounded feelings, or of violated friendship, but only for the protection of property rights.<sup>95</sup> And the jurisdiction rests upon no broader foundation than that of copyright in the letters as literary productions, or of property in the paper on which they are written, a distinction being observed between letters having the characteristics of literary compositions, and merely friendly or private letters on domestic and business affairs. And while the unauthorized publica-

<sup>92</sup> 2 Story's Eq., § 943.

<sup>93</sup> *Queensberry v. Shebbeare*, 2 Eden, 329; *Prince Albert v. Strange*, 1 Mac. & G., 25.

<sup>94</sup> *Pope v. Curl*, 2 Atk., 342; *Thompson v. Stanhope*, Amb., 737; *Gee v. Pritchard*, 2 Swanst., 422; *Granard v. Dunkin*, 1 Ball & B., 207; *Barrett v. Fish*, 72 Vt., 18,

47 Atl., 174, 51 L. R. A., 754, 82

Am. St. Rep., 914. See also *Perceval v. Phipps*, 2 Ves. & B., 19. And see *Palin v. Gathercole*, 1 Coll., 565.

<sup>95</sup> *Gee v. Pritchard*, 2 Swanst., 422; *Barrett v. Fish*, 72 Vt., 18. 47 Atl., 174, 51 L. R. A., 754, 82 Am. St. Rep., 914.

tion of the former class will be restrained, on the principles above stated, equity will not interfere with the latter, even though the publication constitutes a gross violation of honor and trust.<sup>96</sup> So it has been held that where the publication of letters would be a violation of a trust or confidence which is founded on contract, the injunction may be allowed.<sup>97</sup> Nor is the exercise of the jurisdiction confined to cases where the relief is sought by the writer of the letters, but the receiver may invoke the aid of equity to restrain their unauthorized publication.<sup>98</sup> But private letters

<sup>96</sup> *Wetmore v. Scovell*, 3 Edw. Ch., 515; *Hoyt v. Mackenzie*, 3 Barb. Ch., 320. And see *Brandreth v. Lance*, 8 Paige, 24. Mr. Justice Story, however, has expressed himself strongly and feelingly in favor of a contrary doctrine, and has sought to sustain the jurisdiction of equity to restrain the publication of merely private and personal letters, lacking the attributes of literary compositions, on the ground of wounded feelings and injured confidence. See 2 Story's Eq., §§ 946, 947, 948. See also *Folsom v. Marsh*, 2 Story R., 100. But, while we must agree with this learned commentator, that "in a moral view the publication of such letters, unless in cases where it is necessary to the proper vindication of the rights or conduct of the party against unjust claims or injurious imputations, is, perhaps, one of the most odious breaches of private confidence, of social duty, and of honorable feelings, which can well be imagined," yet the weight of authority is clearly opposed to the exercise of the jurisdiction on such

grounds. With the exception of *Woolsey v. Judd*, 4 Duer, 389, 11 How. Pr., 49, and *Eyre v. Higbee*, 35 Barb., 502, 22 How. Pr., 198, neither of which cases was in a court of last resort, it is believed that no decisions, English or American, can be found to sustain the doctrine of Mr. Justice Story. Even the cases cited would seem to rest largely upon the foundation of literary property. The doctrine as stated in the text has the sanction of an unbroken current of authority, beginning with the decision of Lord Eldon in *Gee v. Pritchard*, 2 Swanston, 428. The rule as laid down by McCoun, Vice Chancellor, in *Wetmore v. Scovell*, 3 Edw. Ch., 515, may, therefore, be considered as well established, that "independent of property, and disconnected therefrom, there is no ground or principle on which the jurisdiction to restrain the publication of private letters can properly rest."

<sup>97</sup> 2 Story's Eq., § 949.

<sup>98</sup> *Granard v. Dunkin*, 1 Ball & B., 207; *Thompson v. Stanhope*, Amb., 737. But see *Wren v. Cos-*

obtained from an agent, if not published for profit, but in vindication of defendant's character, which has been aspersed by complainant, will not be restrained.<sup>99</sup> So equity will not enjoin the publication of private letters when it becomes necessary to offer them in evidence in aid of the administration of justice.<sup>1</sup>

§ 1013. **Scientific lectures; system of instruction.** It would seem that scientific lectures, delivered orally, may not be published for profit, or sold for publication, by those entitled to hear them.<sup>2</sup> And students, who have been permitted to copy the system of their instructor in a particular art, will be restrained from its publication, as a fraud upon his rights of property, since an author's use of his manuscripts in the way of instruction is not an abandonment of them to the public.<sup>3</sup> So where one prepares a scientific lecture, which he retains in manuscript and delivers to an audience admitted by ticket, while the persons so admitted are at liberty to take notes of the lecture for their own information, they may be enjoined from publishing such notes, even though they are published in short-hand.<sup>4</sup>

§ 1014. **Publication of magazine.** While the publication of an original work of the same nature, and under a similar title to that of complainant, will not be enjoined, an injunction may properly be allowed to restrain defendant from publishing a magazine as a continuation in successive numbers of

mopolitan Gas Co., 2 Hun, 666, where an injunction was refused which was sought to restrain defendant from circulating letters conveying notice that it would not permit an infringement of its patent. See S. C., 5 Thomp. & C., 686.

<sup>99</sup> Perceval v. Phipps, 2 Ves. & B., 19.

<sup>1</sup> Barrett v. Fish, 72 Vt., 18, 47 Atl., 174, 51 L. R. A., 754, 82 Am. St. Rep., 914.

<sup>2</sup> Abernethy v. Hutchinson, 3 L. J. R. Ch., 209.

<sup>3</sup> Bartlette v. Crittenden, 4 McLean, 300.

<sup>4</sup> Nicols v. Pitman, 26 Ch. D., 37.



complainant's magazine, and also to prevent the publication by defendant of communications received by him while publishing for complainant.<sup>5</sup>

§ 1015. **Libelous publications, conflict of authority.** Upon the question of preventive relief in equity against the publication of libelous statements, affecting the character or business of plaintiff, the authorities, both English and American, indicate a noticeable want of uniformity, and are, indeed, wholly irreconcilable. The earlier English doctrine, and that which seems most in accord with the principles governing the jurisdiction of equity by way of injunction, was that the preventive jurisdiction being limited to the protection of property rights which are remediless by the usual course of procedure at law, courts of equity would not restrain the publication of libels or works of a libelous nature, even though such publications were calculated to injure the credit, business, or character of the person aggrieved, and that he would be left to pursue his remedy at law.<sup>6</sup> Thus, the court has refused to enjoin defendants from publishing or circulating statements to deter persons from becoming shareholders in plaintiffs' company, and asserting that plaintiffs were infringing defendants' rights under letters patent; and whether such statements were well or ill founded was held not material to be considered upon an application for an injunction.<sup>7</sup> And it has been held that the owner of a

<sup>5</sup> *Hogg v. Kirby*, 8 Ves., 215. See as to the right to enjoin the publication of matter contained in plaintiff's newspaper under the English Copyright Act of 1842, *Cate v. Devon & E. C. N. Co.*, 40 Ch. D., 500.

<sup>6</sup> *Prudential Assurance Co. v. Knott*, L. R. 10 Ch., 142; S. C., 7 Chicago Legal News, 405, overruling *Springhead Spinning Co. v.*

*Riley*, L. R. 6 Eq., 551, and *Dixon v. Holden*, L. R. 7 Eq., 488; *Clark v. Freeman*, 11 Beav., 112; *Mulkern v. Ward*, L. R. 13 Eq., 619; S. C., 4 Chicago Legal News, 440; *Hammersmith Co. v. Dublin Co.*, I. R. 10 Eq., 235.

<sup>7</sup> *Hammersmith Co. v. Dublin Co.*, I. R. 10 Eq., 235. See *Thorley's Cattle Food Co. v. Massam*, 6 Ch. D., 532.

patent, whose validity is not impeached, can not be enjoined from issuing notices warning persons from purchasing certain articles upon the ground that they are an infringement of his patent, when it does not appear that such statements are untrue or made *mala fide*.<sup>8</sup> Upon the other hand, injunctions have been freely granted in England to prevent the publication of advertisements or circulars containing false statements which were calculated to injure plaintiffs in their property or business, such as statements by a patentee of his intention to institute legal proceedings for the infringement of his patent by another manufacturer, when defendant had no *bona fide* intention of so doing.<sup>9</sup> So a discharged employee has been enjoined from making false and slanderous statements to the customers of his former employers concerning their business and financial standing, which were calculated to do them serious injury.<sup>10</sup> So pending the trial of an action between the parties, defendant has been enjoined from the threatened publication of circulars abusive of plaintiff and calculated to prejudice him in the trial of his cause.<sup>11</sup> The question, as regards the publication by patentees of statements threatening suits or legal proceedings against alleged infringers, has been finally set at rest in England by an act of parliament authorizing injunctions in such cases, unless the patentee shall with due diligence institute and prosecute the threatened actions for infringement.<sup>12</sup> The American

<sup>8</sup> *Halsey v. Brotherhood*, 19 Ch. D., 386. See also *Quartz Hill C. G. Co. v. Beall*, 20 Ch. D., 501; *Hill v. Hart Davies*, 21 Ch. D., 798; *Liverpool Association v. Smith*, 37 Ch. D. 170. Under §§ 79 and 84 of the English Common Law Procedure Act of 1854, an injunction may be granted in an action for damages for libel to restrain further publication of the libel. See *Bonnard v. Perryman*, (1891) 2 Ch., 269.

<sup>9</sup> *Rollins v. Hinks*, L. R. 13 Eq., 355; *Axmann v. Lund*, L. R. 18 Eq., 330; *Thorley's Cattle Food Co. v. Massam*, 14 Ch. D., 763; *Thomas v. Williams*, 14 Ch. D., 864; *Hayward v. Hayward*, 34 Ch. D., 198.

<sup>10</sup> *Loog v. Bean*, 26 Ch. D., 306.

<sup>11</sup> *Kilcat v. Sharp*, 52 L. J. R. N. S. Ch., 134.

<sup>12</sup> 46 & 47 Vict., August 25, 1883, Ch. 57, § 32. For cases construing this statute, see *Driffield v. Water-*

authorities display the same want of harmony upon the question under consideration which has characterized the English decisions. Some courts have endeavored to make the solution of the question depend upon the good faith of the defendant, granting or withholding relief according as he is prompted by proper or improper motives.<sup>13</sup> The decided weight of American authority, however, seems clearly to support the doctrine of the earlier English cases denying relief in equity against the publication of libelous or slanderous statements, or threats by a patentee of suits for infringement, although there are not wanting decisions of respectable courts to the contrary.<sup>14</sup>

§ 1016. **Translations.** The question whether a translation of a copyrighted work is or is not such an infringement as to entitle the author to the protection of equity, has seldom been presented as a direct question for the decision of the courts, although numerous *dicta* may be found in the ad-

loo Co., 31 Ch. D., 638; Kurtz v. Spence, 33 Ch. D., 579; Challender v. Royle, 36 Ch. D., 425.

<sup>13</sup> Farquhar v. National Harrow Co., 42 C. C. A., 600, 102 Fed., 714, 49 L. R. A., 755; Adriance v. National Harrow Co., 58 C. C. A., 163, 121 Fed., 827; Kelley v. Ypsilanti Mfg. Co., 44 Fed., 19, 10 L. R. A., 686.

<sup>14</sup> Brandreth v. Lance, 8 Paige, 23; Marlin Fire Arms Co. v. Shields, 171 N. Y., 384, 64 N. E., 163, 59 L. R. A., 310; Boston Diatite Co. v. F. M. Co., 114 Mass., 69, 19 Am. Rep., 310; Whitehead v. Kitson, 119 Mass., 484; Consumers Gas Co. v. K. C. G. & C. Co., 100 Mo., 501, 13 S. W., 874, 18 Am. St. Rep., 563; Flint v. H. S. B. Co., 110 Mo., 492, 19 S. W., 804, 16 L. R. A., 243, 33 Am. St. Rep., 476; Life Associa-

tion v. Boogher, 3 Mo. App., 173; Baltimore L. I. Co. v. Gleisner, 202 Pa. St., 386, 51 Atl., 1024; Kidd v. Horry, 28 Fed., 773; Baltimore Car Wheel Co. v. Bemis, 29 Fed., 95; New York Filter Co. v. Schwarzwald, 58 Fed., 577; Computing Scale Co. v. National C. S. Co., 79 Fed., 962; Balliet v. Cassidy, 104 Fed., 704. See, *contra*, Emack v. Kane, 34 Fed., 46; Bell v. Singer Co., 65 Ga., 452; Grand Rapids S. F. Co. v. H. S. F. Co., 92 Mich., 558, 52 N. W., 1009, 16 L. R. A., 721, 31 Am. St. Rep., 611; Shoemaker v. South Bend S. A. Co., 135 Ind., 471, 35 N. E., 280, 22 L. R. A., 332; Columbia National S. D. Co. v. Miller, 20 App. D. C., 245. See also Meyer v. Devries, 64 Md., 532, 2 Atl., 915; Chase v. Tuttle, 27 Fed., 110.

judicated cases bearing more or less directly upon the subject.<sup>15</sup> It has, however, been held in one instance that a translation is not such an infringement as to call for the aid of equity, and that it will not be enjoined. The court proceeded upon the reasoning that an author can claim no literary property, after publication, in his ideas, thoughts or sentiments, apart from the language and outward semblance in which they are couched; and that when he has sold his book, the only property which he can reserve to himself, or in which the law will protect him, is the exclusive right to multiply copies of the particular combination of characters in which his ideas are clothed.<sup>16</sup> While the doc-

<sup>15</sup> See *Millar v. Taylor*, 4 Burr., 2303; *Murray v. Bogue*, 1 Drew., 353; *Prince Albert v. Strange*, 2 DeGex & S., 652; *Burnett v. Chetwood*, 2 Meriv., 441, note.

<sup>16</sup> *Stowe v. Thomas*, 2 Wal. Jr., 547; S. C., 2 Am. Law Reg., 210. This was a bill for an injunction, alleging that complainant was the author and proprietor of a work called "Uncle Tom's Cabin," which was duly copyrighted, and that defendant had translated the same into German, and printed, published and sold it, both in newspaper and pamphlet form. The answer admitted the facts, but denied that they constituted an infringement. The relief was denied, Grier, J., observing as follows: " \* \* \* An author may be said to be the creator, or inventor, both of the ideas contained in his book, and the combination of words to represent them. Before publication he has the exclusive possession of his invention. His dominion is perfect. But when he has published his book and given his

thoughts, sentiments, knowledge or discoveries to the world, he can have no longer an exclusive possession of them. Such an appropriation becomes impossible, and is inconsistent with the object of publication. The author's conceptions have become the common property of his readers, who can not be deprived of the use of them, or their right to communicate them to others clothed in their own language, by lecture or by treatise. The claim of literary property, therefore, after publication, can not be in the ideas, sentiments or the creations of the imagination of the poet or novelist, as dis severed from the language, idiom, style or the outward semblance and exhibition of them. His exclusive property in the creation of his mind can not be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them. When he has sold his book, the only property which he reserves to himself.

trine thus stated has not been overruled by any judicial decision, yet it is so manifestly opposed to the evident purpose of all our copyright legislation, and so opposed to the plainest principles of justice, that it is believed that a contrary doctrine will be applied should the question ever

or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed. This is what the law terms copy, or copyright. See Curtis on Copyright, 9, 10, 11, etc. \* \* \* The notion that a translation is a piracy of the original composition, is founded on the analogy assumed between copyright and patents for inventions, and where the infringing machine is only a change of the form or proportions of the original, while it embodies the principle or essence of the invention. But as the author's exclusive property in a literary composition, or his copyright, consists only in a right to multiply copies of his book, and enjoy the profits therefrom, and not in an exclusive right to his conceptions and inventions, which may be termed the essence of his composition, the argument from the supposed analogy is fallacious. Hence, in questions of infringement of copyright, the inquiry is not whether the defendant has used the thoughts, conceptions, information or discoveries promulgated by the original, but whether his composition may be considered a new work requiring invention, learning and judgment, or only a mere transcript of the

whole or parts of the original, with merely colorable variations. Hence, also, the many cases to be found in the reports, which decide that a *bona fide* abridgment of a book is not an infringement of copyright. To make a good translation of a work often requires more learning, talent and judgment than was required to write the original. Many can transfer from one language to another, but few can translate. To call a translation of an author's ideas and conceptions into another language a copy of his book would be an abuse of terms, and arbitrary judicial legislation. \* \* \* The distinction taken by some writers on the subject of literary property, between the works which are *publici juris*, and those which are subject to copyright, has no foundation in fact, if the established doctrine of the cases be true, and the author's property in a published book consists only in a right of copy. By the publication of her book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. Uncle Tom and Topsy are as much *publici juris*, as Don Quixote and Sancho Panza. All her conceptions and inventions may be used and abused by imitators, playwrights and poetasters. They are no longer

again be presented to the courts.<sup>17</sup> And where one has published and copyrighted a work containing translations from foreign works, which were translated by a person employed and paid by plaintiff, he is entitled to enjoin the publication of such translations.<sup>18</sup>

§ 1017. **Readings, recitations and plays derived from original work.** The question of piracy is to be considered as confined to the multiplication of copies of the original work; any use of the original, other than multiplying it, whether by public readings or recitations, or even by the representation of a play founded upon or derived from the work, does not constitute such an infringement as equity will restrain, subject, however, to the limitation that no copies are to be distributed among the audience.<sup>19</sup> But the printing and publishing of a play which is taken largely from plaintiff's books may be perpetually enjoined, regardless of the question of pecuniary damage.<sup>20</sup> And it has been held that the multiplication of copies, in the absence of any intention to sell them, is an infringement.<sup>21</sup>

§ 1018. **Newspaper; descriptive advertisement.** It would seem that under the English statutes, although a newspaper

her own—those who have purchased her book may clothe them in English doggerel, in German or Chinese prose. Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished; and all that now remains is the copyright of her book, the exclusive right to print, re-print and vend it; and those only can be called infringers of her right, or pirates of her property, who are guilty of printing, publishing, importing or vending without her license 'copies of her book.' In topical, but not very precise phraseology, a translation may be called

a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book. The plaintiff's bill is therefore dismissed with costs."

<sup>17</sup> See the vigorous criticism of Mr. Drone upon the case of *Stowe v. Thomas*, *Drone on Copyright*, 454 *et seq.*

<sup>18</sup> *Wyatt v. Barnard*, 3 Ves. & B., 77.

<sup>19</sup> *Reade v. Conquest*, 9 C. B. N. S., 755; *Tinsley v. Lacy*, 1 Hem. & M., 747.

<sup>20</sup> *Tinsley v. Lacy*, 1 Hem. & M., 747.

<sup>21</sup> *Novello v. Sudlow*, 12 C. B., 177.

is not copyrightable, it is yet entitled to protection as an article of property, and a bill may be entertained to restrain the publication by defendant of matter taken from plaintiff's newspaper.<sup>22</sup> But it has been held in England that there is no copyright in a descriptive advertisement or illustrated guide used for advertising goods which are manufactured and sold by plaintiff, and that equity will not enjoin the piracy of such a publication.<sup>23</sup>

§ 1019. **Representing defendant's work as that of plaintiff.** An injunction may properly be allowed to restrain the publication by defendant of a work which he represents to be that of plaintiff, when it is in fact not the plaintiff's production.<sup>24</sup> And where defendant publishes a literary work which he represents to be the production of plaintiff, when only a portion of it is such, an injunction is the appropriate remedy if the public are likely to be misled by the title page of defendant's work into the belief that it is plaintiff's.<sup>25</sup> Where, however, defendant's statements do not amount to a representation that his publication contains matter which is the exclusive property of plaintiff, the injunction will not be allowed, even though defendant has used language concerning plaintiff's edition which, if untrue, might be actionable.<sup>26</sup>

§ 1020. **Copyright in part of book protected.** There may be copyright in part of a book, although not in the whole, and such part will be protected in equity by enjoining a piracy.<sup>27</sup> Thus, the headings used in a trades journal will be protected by injunction against piracy, although the letter-press consists entirely of advertising matter which is

<sup>22</sup> *Cox v. Land & Water Journal Co.*, L. R. 9 Eq., 324. But the injunction was refused upon the facts of the case. And see *Walter v. Howe*, 17 Ch. D., 708; *Cate v. Devon & E. C. N. Co.*, 40 Ch. D., 500.

<sup>23</sup> *Cobbett v. Woodward*, L. R. 14 Eq., 407. But see this case crit-

icized, *Drone on Copyright*, 165 *et seq.*

<sup>24</sup> *Lord Byron v. Johnston*, 2 Meriv., 29.

<sup>25</sup> *Harte v. De Witt*, 1 Cent. L. J., 360.

<sup>26</sup> *Seeley v. Fisher*, 11 Sim., 581.

<sup>27</sup> *Low v. Ward*, L. R. 6 Eq., 415.

not entitled to protection.<sup>28</sup> And when the infringement goes to a part of plaintiff's work, and there is no difficulty in distinguishing such part from the residue, the injunction will go as to that part, but not as to the remainder.<sup>29</sup> So it is proper to enjoin as to the parts which are pirated, without waiting until the pirated matter has been definitely ascertained.<sup>30</sup>

§ 1021. **Accounting incidental to injunction.** In actions to restrain the infringement of copyrights the right to an account of profits is an incident to the right to relief by injunction; and such an account may be had under the prayer for general relief, although not specially prayed.<sup>31</sup>

<sup>28</sup> *Lamb v. Evans*, 62 L. J. N. S. Ch., 404.

<sup>30</sup> *Kelly v. Morris*, L. R. 1 Eq., 697.

<sup>29</sup> *Carnan v. Bowles*, 2 Bro. C. C., 81; S. C., 1 Cox, 283; *Farmer v.*

<sup>31</sup> *Stevens v. Gladding*, 17 How., 447.

*Elstner*, 33 Fed., 494.



## II. PRINCIPLES GOVERNING THE JURISDICTION.

- § 1022. The general doctrine stated.
- 1023. Establishing title at law.
- 1024. How piracy determined; defendant's intent immaterial.
- 1025. The doctrine applied; deception of purchasers; copying errors of plaintiff's book.
- 1026. Doctrine of relative convenience; injunction refused when infringement doubtful; bond by defendant.
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- 1028. Doctrine of acquiescence and laches.
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- 1034. Effect on sale of defendant's work no bar to relief.
- 1035. Restrictive covenant by author or proprietor on sale of work.
- 1036. How pirated parts to be designated.
- 1036a. Part of defendant's work a piracy, when whole enjoined.
- 1037. Injunction conditioned upon action at law.

§ 1022. **The general doctrine stated.** The true principle to be applied in cases where it is sought to restrain a piracy of copyright is, that defendant is not at liberty to use or avail himself of plaintiff's labor for the purpose of producing his work.<sup>1</sup> If the infringement is palpable and a provisional injunction will not be attended with serious injury, it is not ordinarily refused as to so much of defendant's work as is a plain infringement of plaintiff's publication.<sup>2</sup> Where the bill upon its face establishes the existence of the copyright and of complainant's title, and shows a wrongful and wilful violation thereof, from which serious injuries have resulted, or are likely to result, the injunction will be granted, its extent depending upon the proof and the nature of the

<sup>1</sup> Hogg v. Scott, L. R. 18 Eq., 444.

<sup>2</sup> Banks v. McDivitt, 13 Blatch., 163.

publication.<sup>3</sup> And this relief is not dependent upon the discovery prayed by the bill, but rests upon the equities stated, and may be granted or refused independent of the discovery.<sup>4</sup>

§ 1023. **Establishing title at law.** We have already seen, in discussing the subject of injunctions to restrain the infringement of patents, that the stringency of the rule formerly maintained by the English Court of Chancery, requiring the right to be first established at law, has been much relaxed, and that where the right is clear and the infringement unquestioned, the patentee will not be compelled in the first instance to proceed at law.<sup>5</sup> The same observations are applicable where an injunction is sought against an infringement of copyright, and while the court may, if it sees fit, require a verdict at law touching the alleged infringement,<sup>6</sup> yet the doctrine may now be regarded as well settled, that both the right and the infringement may be adjudicated in a court of equity, without having been first determined at law.<sup>7</sup> And where the same judge sits both at law and in equity, there is not the same necessity for requiring plaintiff first to establish his title at law as formerly existed under the English practice, where the chancellors and common law judges were different; and if all the necessary facts are before the court, it may determine the application for an injunction without sending plaintiff to law to establish his title.<sup>8</sup> Equity will not, however, grant an injunction to restrain the infringement of a copyright unless plaintiff's

<sup>3</sup> *Atwill v. Ferrett*, 2 Blatch., 39; *Lewis v. Fullarton*, 2 Beav., 6.

<sup>4</sup> *Atwill v. Ferrett*, 2 Blatch., 39.

<sup>5</sup> See § 936, *ante*, and cases cited.

<sup>6</sup> *Blunt v. Patten*, 2 Paine, 397.

<sup>7</sup> *Farmer v. Calvert L. E. & M. P. Co.*, 5 Chicago Legal News, 1.

<sup>8</sup> *Pierpont v. Fowle*, 2 Woodb. &

*M.*, 23. And see this case as to the right to protect the copyright in the extended term, as between an author and one by whom he is employed and paid to write the work, and to whom he sells the copyright.

title is clear.<sup>9</sup> But it is not indispensable to obtaining the relief that plaintiff should make out a clear legal title, and the court will be content with a *prima facie* title, either legal or equitable, or with a clear color of title and assertion of the right.<sup>10</sup>

§ 1024. **How piracy determined; defendant's intent immaterial.** The chief difficulty experienced in attempting to apply the principles of equity to the protection of copyrights is in ascertaining whether the work sought to be enjoined is an original or a piracy. If the work is of such a character that the piracy may be easily detected, the court will itself make the examination.<sup>11</sup> But the more usual practice is to refer the case to a master, who examines the works and reports to the court; and upon this report the interlocutory as well as the final decree is generally based.<sup>12</sup> And if it is ascertained that the publication complained of is piratical, the question of guilt or innocence on the part of defendant is immaterial, and the relief will be granted, regardless of the intent with which defendant's work was published.<sup>13</sup> The question of intent becomes material only in cases of doubt as to the invasion of the right.<sup>14</sup> So if defendants are guilty of a clear infringement of plaintiff's copyright, the fact that they have circulated their publication only among their own agents or customers and have not publicly sold or offered it

<sup>9</sup> *Lowndes v. Duncombe*, 2 Coop. t. Cottenham, 216.

<sup>10</sup> 2 Story's Eq., § 935; *Universities v. Richardson*, 6 Ves., 689; *Chappell v. Purday*, 4 Y. & C., 485. As to the right to relief by injunction for the protection of a foreigner under the English copyright law, see *Delondre v. Shaw*, 2 Sim., 237.

<sup>11</sup> *Lewis v. Fullarton*, 2 Beav., 6.

<sup>12</sup> 2 Story's Eq., § 941; *Cary v. Faden*, 5 Ves., 24. But in *Smith*

*v. Johnson*, 4 Blatch., 252, it is held that the motion for the injunction must be disposed of on the moving papers of complainant and defendant's affidavits in opposition thereto, and that on such motion no reference to a master will be allowed.

<sup>13</sup> *Reade v. Conquest*, 11 C. B. N. S., 479; *Reed v. Holliday*, 19 Fed., 325.

<sup>14</sup> *Webb v. Powers*, 2 Woodb. & M., 497.

for sale constitutes no bar to an injunction.<sup>15</sup> Nor is it necessary to show that defendant's publication is a substitute for the original work, or to prove any actual damage sustained by the infringement to entitle plaintiff to relief by injunction.<sup>16</sup>

§ 1025. **The doctrine applied; deception of purchasers; copying errors of plaintiff's book.** If the fact of piracy be clearly established, the *animus furandi* is to be inferred from the act of piracy itself. And where some of plaintiff's poems are published by defendant entire in his work, and large extracts are given from others, the pirated matter constituting the chief value of defendant's book, an injunction should be allowed. If, in such case, plaintiff's right has been clearly violated, he is the best judge as to whether he has actually been injured, and the court will incline to grant the injunction upon satisfactory proof of the piracy.<sup>17</sup> So when defendant produces a book with such similarity of title, form and title-page to that of plaintiff as to induce purchasers to believe that they are buying plaintiff's work, a proper case is presented for an injunction.<sup>18</sup> And the fact of defendant having copied the errors of plaintiff's book is an ordinary and familiar test in determining whether he is guilty of such a piracy as to warrant an injunction.<sup>19</sup>

§ 1026. **Doctrine of relative convenience; injunction refused when infringement doubtful; bond by defendant.** The doctrine of relative convenience is applicable to cases where

<sup>15</sup> *Ager v. Peninsular & O. S. N. Co.*, 26 Ch. D., 637. 25 C. C. A., 648, 79 Fed., 756, 35 L. R. A., 400; *Ladd v. Ox-*

<sup>16</sup> *Reed v. Holliday*, 19 Fed., 325.

<sup>17</sup> *Campbell v. Scott*, 11 Sim., 30.

<sup>18</sup> *Metzler v. Wood*, 8 Ch. D., 606.

<sup>19</sup> *Murray v. Bogue*, 1 Drew., 353; *Chicago Dollar Directory Co. v. Chicago Directory Co.*, 14 C. C. A., 213, 66 Fed., 977; *West Publishing Co. v. Lawyers C. P. Co.*,

*nard*, 75 Fed., 703; *Mead v. West Publishing Co.*, 80 Fed., 380. And see *Murray v. Bogue*, *supra*, as to the considerations governing the court in refusing an interlocutory injunction against an alleged infringement of plaintiff's guiding book.

it is sought to enjoin the piracy of copyright, as well as to most other branches of the law of injunctions. And upon an application for an interlocutory injunction in this class of cases, the court may consider the question as to which of the parties is more likely to suffer by an erroneous or hasty judgment of an interlocutory nature. And if, upon such consideration, the court is satisfied that the ends of justice will be better attained by refusing than by granting the injunction, it may withhold the relief; but it may, in such event, require defendants to continue to keep an account, giving an undertaking with respect to damages in the event of plaintiff's title and the infringement thereof being ultimately established.<sup>20</sup> So if upon the motion for a preliminary injunction there are grave doubts whether plaintiff actually has a copyright in the publication in question, or, if he has a copyright, whether defendant has infringed, the court will not pass upon these questions upon a preliminary application, and will refuse the injunction *in limine*, leaving the whole matter to be determined upon the final hearing.<sup>21</sup> And where there is substantial doubt as to the infringement of plaintiff's copyright and where an injunction would result in serious injury to the defendants in the publication of their work, an interlocutory application based upon *ex parte* affidavits should be denied.<sup>22</sup> So where the evidence of irreparable injury to plaintiff is not at all clear and the granting of a preliminary injunction, instead of preserving the *status quo*, would result in the entire suspension of defendant's business, the court may properly deny an interlocutory injunction upon the filing of a bond by defendant.<sup>23</sup>

§ 1027. **Piracy not protected; immoral and irreligious works.** The interference by injunction being purely equitable, he

<sup>20</sup> McNeill v. Williams, 11 Jur., 344.

<sup>22</sup> Lare v. Harper & Bros., 30 C. C. A., 373, 86 Fed., 481.

<sup>21</sup> Miller v. McElroy, 1 Am. Law Reg., 198.

<sup>23</sup> Ladd v. Oxnard, 75 Fed., 703.

who seeks this species of relief must come into court with clean hands, and a book which is itself a piracy will not be protected.<sup>24</sup> And since, on grounds of public policy, no copyright can exist in a work which is manifestly immoral, irreligious or obscene, if it be matter of doubt whether the work in favor of which the aid of equity is sought comes within these classes, the threatened piracy will not be restrained, but the party will be left to pursue his remedy at law.<sup>25</sup> And where there was doubt as to whether the work sought to be protected impugned the doctrine of the Scriptures, an injunction was refused against its infringement.<sup>26</sup>

§ 1028. **Doctrine of acquiescence and laches.** Upon the question of the effect of plaintiff's acquiescence in defendant's publication, and of his laches and delay in invoking equitable relief, the same general principle is applicable which governs in other branches of the law of injunctions. That principle is, that a plaintiff who, with full knowledge of all the facts, acquiesces in a given course of conduct on the part of defendant, and knowingly permits the expenditure by defendant of large sums of money upon the strength of such acquiescence, or who is guilty of great laches and long delay in the assertion of his rights, may be estopped from afterward enjoining defendant from asserting the right

<sup>24</sup> *Cary v. Faden*, 5 Ves., 24; *Edward Thompson Co. v. American Law Book Co.*, 59 C. C. A., 148, 122 Fed., 922.

<sup>25</sup> 2 Story's Eq., § 936; *Walcot v. Walker*, 7 Ves., 1; *Southey v. Sherwood*, 2 Meriv., 435; *Lawrence v. Smith, Jac.*, 471. And see *Martineti v. Maguire*, 1 Abb. U. S. R., 356.

<sup>26</sup> *Lawrence v. Smith, Jac.*, 471. *Eldon*, Chancellor, says: "Looking at the general tenor of the work,

and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the Scriptures, considering that the law does not give protection to those who contradict the Scriptures, and entertaining a doubt, I think a rational doubt, whether this book does not violate that law, I can not continue the injunction. The plaintiff may bring an action, and when that is decided he may apply again."

in controversy. And the rule may be regarded as well established that whenever defendant has been induced by plaintiff's conduct or encouragement to go on with the publication in question, or when plaintiff has for a long period knowingly acquiesced in such publication without remonstrance or complaint, a court of equity may properly refuse to lend its aid by injunction to restrain the alleged infringement of plaintiff's copyright.<sup>27</sup>

§ 1029. **Illustrations of the doctrine.** As illustrating the doctrine of acquiescence as applied to actions to restrain the infringement of copyright, it is held that where the alleged piracy consists in the publication of a spelling-book containing alterations and improvements from former works of the same nature, and defendant has been allowed to publish for two years, without objection, an injunction will be refused and complainant will be left to his remedy at law.<sup>28</sup> And where the matter alleged to be pirated forms a very inconsiderable portion of the work, consisting merely of arithmetical calculations which may be again computed by a few hours' labor, and thus give defendant an unquestioned right to their publication, complainant having for a number of years slept upon his rights without objecting, an injunction will be refused.<sup>29</sup> So an injunction has been refused which was sought for the protection of a work giving interest tables with calculations of interest on money for different periods.<sup>30</sup> And generally it may be said that

<sup>27</sup> *Saunders v. Smith*, 3 Myl. & Cr., 711; *Bailey v. Taylor*, 3 L. J., 66; *Rundell v. Murray*, Jac., 311; *Southey v. Sherwood*, 2 Meriv., 435; *Lewis v. Chapman*, 3 Beav., 133; *Tinsley v. Lacy*, 1 Hem. & M., 747; *Assignees v. Wilkins*, 8 Ves., note to page 224, second English edition. See also *Chappell v. Sheard*, 1 Jur. N. S., 996; *Corre-*

*spondent Newspaper Co. v. Saunders*, 12 L. T. N. S., 540. But see *Drone on Copyright*, 508.

<sup>28</sup> *Assignees v. Wilkins*, 8 Ves., note to page 224, second English edition.

<sup>29</sup> *Baily v. Taylor*, 1 Russ. & M., 73; S. C., Taml., 295.

<sup>30</sup> *King v. Reed*, 8 Ves., note to page 223, second English edition.

a court of equity in the exercise of its discretion as to interfering by injunction before the legal right is established, will not enjoin an alleged infringement of a copyright, before action at law, where complainant's conduct has been such as to induce defendants to believe that their publication would not be interfered with.<sup>31</sup> Thus, where the owner of a copyright has, for a considerable period of time, permitted persons to copy cases from his works without objection, he will not be allowed to enjoin other parties from transcribing cases from the same works, until he has first established his title at law.<sup>32</sup> And where plaintiff gives a publication to defendant without compensation, and permits him to publish it for a period of fourteen years without objection or complaint, equity will refuse to enjoin defendant from such publication.<sup>33</sup> So where it is sought to enjoin the publication of a work which the author had for many years left in the hands of a book-seller to whom it was originally sent for publication, the author having subsequently abandoned his intention of publishing it, and the book having passed into the hands of defendants who published it with the author's consent, an injunction was refused until plaintiff should establish his right at law.<sup>34</sup> And where the two works were preparing for publication at the same time, and defendant's was completed more than six years before the filing of the bill, and for more than a year before instituting their action plaintiffs were in possession of a complete copy of defendant's work, which they had obtained for purposes of comparison, an injunction was refused.<sup>35</sup>

§ 1030. **Foundation of the doctrine; burden of proof.** The doctrine of laches as a bar to equitable relief in cases of

<sup>31</sup> *Saunders v. Smith*, 3 Myl. & Cr., 711. And see *Bramwell v. Halcomb*, *ib.*, 737.

<sup>32</sup> *Saunders v. Smith*, 3 Myl. & Cr., 711.

<sup>33</sup> *Rundell v. Murray, Jac.*, 311.

<sup>34</sup> *Southey v. Sherwood*, 2 Meriv., 435.

<sup>35</sup> *Lewis v. Chapman*, 3 Beav., 133.



this nature also rests upon the principle that if the owner of the copyright or musical composition for which protection is sought suffers one infringement upon his rights to go unchallenged, the court will be averse to permitting him to question another infringement. Plaintiff must, therefore, purge himself of laches before he can be allowed relief; although the burden of proving it in the first instance rests upon the defendant, who must show a clear knowledge by plaintiff of the former infringements and his acquiescence therein for a long period of time, if he seeks to fasten upon plaintiff the consequences of such laches for the purpose of preventing him from obtaining relief against other infringements.<sup>36</sup>

§ 1031. **No acquiescence without knowledge.** It is, however, to be borne in mind that there can be no such acquiescence in defendant's publication, within the meaning of the rule, as to bar relief in equity, unless plaintiff has had full knowledge of the publication which he afterward seeks to enjoin. And the fact that plaintiff's book has been out of print for a number of years, and has become obsolete and forgotten in the trade, will not prevent relief by injunction against an infringement of his rights.<sup>37</sup> So it has been held that knowledge on the part of plaintiff that defendant was advertising his book which contained the objectionable matter in controversy, and that he was going on with its sale, or that he was about to issue a new edition, did not constitute such acquiescence as to prevent relief in equity by injunction.<sup>38</sup>

§ 1032. **Usage as to reviewing magazines can not prevent relief against piracy.** The mere custom or usage of the trade to publish extracts or stories from a copyrighted

<sup>36</sup> Chappell v. Sheard, 1 Jur. N. S., 996.

<sup>38</sup> Hogg v. Scott, L. R. 18 Eq., 444.

<sup>37</sup> Weldon v. Dicks, 10 Ch. D., 247.

periodical can not be successfully interposed as a bar to relief by injunction against the infringement. Thus, where plaintiff was the publisher of a magazine in London, which he had been in the habit for many years of sending to defendant for review in a country newspaper published by the latter, and defendant had been in the habit of reviewing such magazine and from time to time publishing extracts or an entire story therefrom, giving credit for the same and sending plaintiff copies of such papers, and defendant received another copy of the magazine which he reviewed and from which he published two articles entire, acknowledging the same and sending copies to the plaintiff, the court granted an injunction to restrain such piracy, notwithstanding the custom or usage, but because of defendant's good faith required each party to pay his own costs.<sup>39</sup>

§ 1033. **When relief withheld until action at law; difficulty in estimating profits.** Where an injunction against the invasion of a copyright depends upon the effect of an agreement and the construction it shall receive, relief may be withheld until a recovery in an action at law. And if the publication is of such a nature as to render it doubtful whether the author can maintain any action at law, an injunction will be withheld until the court can be satisfied upon this point.<sup>40</sup> But mere difficulty in estimating the

<sup>39</sup> *Maxwell v. Somerton*, 30 L. T. N. S., 11.

<sup>40</sup> *Walcot v. Walker*, 7 Ves., 1. Lord Eldon says: "If the doctrine of Lord Chief Justice Eyre is right, and I think it is, that publications may be of such a nature that the author can maintain no action at law, it is not the business of this court, even upon the submission in the answer, to decree either an injunction or an account of the profits of works of

such a nature that the author can maintain no action at law for the invasion of that which he calls his property, but which the policy of the law will not permit him to consider his property. It is no answer that the defendants are as criminal. It is the duty of the court to know whether an action at law would lie; for, if not, the court ought not to give an account of the unhallowed profits of libelous publications."

profits arising from a sale of books sought to be enjoined will not deter a court of equity from awarding an injunction.<sup>41</sup>

§ 1034. **Effect on sale of defendant's work no bar to relief.** The fact that an injunction will effectually stop the sale and circulation of the work enjoined constitutes no objection to granting the relief if the piracy be established, since, if the original can not be separated from the pirated matter without destroying the value of the former, the defendant, having made the mixture, must suffer the consequences.<sup>42</sup> And the same principles apply in such case as are applicable to the malicious or wanton confusion of property.<sup>43</sup>

§ 1035. **Restrictive covenant by author or proprietor on sale of work.** Where an author has sold and assigned the copyright of his work, published in his name, and has bound himself by express covenant not to publish any work prejudicial to the sale of the former, a publisher who, with notice of such covenant, publishes a work purchased from the same author, in the same name and upon the same subject, will be enjoined, although the latter work is not a piracy of the former, and is published under a different title.<sup>44</sup> But the rule would seem to be otherwise where the publisher purchases the rival work in good faith, and without notice of the covenant on the part of the author.<sup>45</sup> And where the proprietor of a weekly periodical assigns his copyright and entire interest, for a valuable consideration, and at the same time agrees not to publish any weekly periodical of like nature, he may be enjoined from publishing a daily journal under the same name and at the same price, complainant

<sup>41</sup> *Universities v. Richardson*, 6 Ves., 689.

<sup>42</sup> 2 Story's Eq., § 942; *Mawman v. Tegg*, 2 Russ., 385. And see *Jarrold v. Houlston*, 3 Kay & J., 708.

<sup>43</sup> *Mawman v. Tegg*, 2 Russ., 385.

<sup>44</sup> *Barfield v. Nicholson*, 2 L. J. Ch., 90; S. C., 2 Sim. & St., 1.

<sup>45</sup> *Barfield v. Nicholson*, 2 L. J. Ch., 90; S. C., 2 Sim. & St., 1.

undertaking to abide by the order of the court as to damages, and to bring his action at law against defendant within one week.<sup>46</sup>

§ 1036. **How pirated parts to be designated.** It is not incumbent upon plaintiff to specify in his bill or by affidavit the particular parts of his work alleged to be pirated, and a general allegation that defendant's publication contains passages from his own, accompanied with a verification of the rival works by affidavit, will suffice.<sup>47</sup> Where, however, there is nothing before the court to identify or distinguish those parts of plaintiff's work in which he claims a copyright, and defendant's affidavits deny the equities of the bill, an injunction will not be granted *in limine*.<sup>48</sup>

§ 1036 a. **Part of defendant's work a piracy, when whole enjoined.** Although a large part of defendant's work may consist of original matter, yet where a substantial portion of it has been stolen from the plaintiff and the pirated portions are so intermingled with the original as to render it impossible for the court to separate the good from the bad, the whole work will be regarded as so tainted with piracy as to warrant an injunction against the publication of it in its entirety and the writ will accordingly issue in that form, with leave, however, to defendant to have the injunction modified or vacated as to such portions as are afterward eliminated or shown to be original matter.<sup>49</sup>

§ 1037. **Injunction conditioned upon action at law.** It is proper for the court to grant the injunction upon condition of plaintiff bringing an action at law to establish his

<sup>46</sup> *Ingram v. Stiff*, 5 Jur. N. S., 947.

<sup>47</sup> *Sweet v. Maugham*, 11 Sim., 51.

<sup>48</sup> *Flint v. Jones*, 1 Weekly Notes of Cases, 334.

<sup>49</sup> *West Publishing Co. v. Lawyers C. P. Co.*, 25 C. C. A., 648, 79 Fed., 756 35 L. R. A., 400; *Williams v. Smythe*, 110 Fed., 961.

legal title.<sup>50</sup> But when the injunction is continued subject to plaintiff bringing his action at law, defendant will not be allowed, without plaintiff's consent, to continue the sale of the work upon condition of keeping an account.<sup>51</sup>

<sup>50</sup> *Campbell v. Scott*, 11 Sim., 30.      <sup>51</sup> *Sweet v. Maugham*, 11 Sim., 51.

## III. DRAMATIC COMPOSITIONS.

- § 1038. Distinction between statutory and common law right; jurisdiction of state and federal courts.
- 1039. Representation of plaintiff's play not such publication as to debar him from relief.
- 1040. Different doctrine in England.
- 1041. Unauthorized production of play enjoined.
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- 1045. Title of play not protected; when title of novel not infringed by use as name of play.
- 1046. Dramatization of novel; colorable imitation; parties *in pari delicto*.
- 1047. Scenic or spectacular effects.
- 1048. Immoral play not protected.
- 1049. Unpublished manuscripts protected by act of Congress.
- 1050. Translation protected.
- 1051. Injunction against publication of manuscript.
- 1052. Deposit of money in lieu of injunction.

§ 1038. **Distinction between statutory and common law right; jurisdiction of state and federal courts.** The protection of dramatic compositions from piracy or infringement, either by publication or by their unauthorized representation upon the stage, affords frequent occasion for invoking the preventive aid of equity by injunction. In the case of a published play, where due compliance has been had with the formalities of the copyright law, protection must be sought under that law, as in other cases of copyright; in which event, of course, the remedy is to be sought in the federal courts.<sup>1</sup> But the author or owner of an unpublished drama which remains in manuscript has such a property in its use and enjoyment as will be protected by injunction, such property, not being distinguishable from other personal

<sup>1</sup> See as to the jurisdiction of cases, Drone on Copyright, chapter the United States courts in such ter xii.

property, being governed by the same rules of transfer and entitled to the benefit and protection of the same remedies.<sup>2</sup> And the alienage of the author affords no obstacle to him or his assignee in proceeding to enjoin a violation of his rights of property in such unpublished manuscript, and the state courts have undoubted jurisdiction to afford relief in such cases, as in other actions affecting common law rights or property interests.<sup>3</sup> So a court of general equity powers in one state, which has acquired full jurisdiction over the parties to the controversy, may properly enjoin a defendant from infringing plaintiff's proprietary right in an unpublished drama by its production in another state.<sup>4</sup> Or, if the proper conditions of citizenship exist to give the

<sup>2</sup> *Palmer v. De Witt*, 47 N. Y., 532, affirming S. C., 2 Sweeny, 530, 3 Albany Law Journal, 54; *Crowe v. Aiken*, 2 Biss., 208; *French v. Maguire*, 55 How. Pr., 471; *Boucicault v. Hart*, 13 Blatch., 47; S. C., 22 Int. Rev. Rec., 150.

<sup>3</sup> *Palmer v. De Witt*, 47 N. Y., 532, affirming S. C., 2 Sweeny, 530, 3 Albany Law Journal, 54. The court say, p. 535: "Whatever rights the plaintiff has in the drama which is the subject of the controversy exist at common law, independent of any statute either of the state or of the United States. The protection he seeks is of property and a right of property which is well established and recognized wherever the common law prevails, and not of a franchise or privilege conferred by statute. The state courts have jurisdiction as in other actions affecting common law rights or property interests. \* \* \* Until published the work is the private

property of the author, wherever the common law rights of authors are regarded. When once published, with the assent of the author, it becomes the property of the world, subject only to such rights as the author may have secured under copyright laws, and they can have no force nor give any rights beyond the territorial limits of the government by which they are enacted. The rights of assignees domiciled here, of alien authors resident abroad, have been sustained by the courts of this country, and no distinction has been made between transfers of literary property and property of any other description. \* \* \* The alienage of the author is no obstacle to him or his assignee in proceeding in our courts for a violation or to prevent a violation of his rights of property in his unpublished works."

<sup>4</sup> *French v. Maguire*, 55 How. Pr., 471.

United States courts jurisdiction, the proceeding for the protection of the common law right by injunction may be brought in those courts.<sup>5</sup> This common law right, existing entirely independent of the copyright acts, may be transferred, and a court of equity will protect the assignee of the right by granting him the aid of an injunction against its infringement.<sup>6</sup> And a purchaser of the original manuscript of a play or dramatic composition is entitled to protection by injunction against the infringement of his rights by defendant in producing his play, even though defendant has acted in good faith, and under the supposition that he himself owned the manuscript.<sup>7</sup>

§ 1039. **Representation of plaintiff's play not such publication as to debar him from relief.** Upon general principles, and irrespective of the operation of statutes, the doctrine is well established that the public representation of a play at

<sup>5</sup> *Keene v. Wheatley*, 9 Am. Law Reg., 33; *Crowe v. Aiken*, 2 Biss., 208. See also *Goldmark v. Kreling*, 11 Sawy., 215; S. C., 25 Fed., 349.

<sup>6</sup> *Crowe v. Aiken*, 2 Biss., 208. "The author of any literary or dramatic work," says Drummond, J., p. 211, "is the sole proprietor of the manuscript and its contents, and of copies of the same, independently of legislation, so long as he does not publish it, or part with the right of property. This is called a common law right, and exists irrespective of copyright statutes. This right of property he can transfer, and a court of equity will protect him or his assignee, in a proper case, just as it will the owner of any other species of property. Those judges who maintained this com-

mon law right in the cases of *Millar v. Taylor* and in *Donaldson v. Becket*, decided a hundred years ago, it has always been thought, had the strength of the argument on their side in the great discussion to which they gave rise. Subject to the qualification stated, it has been generally admitted in this country. \* \* I am of opinion that upon principle and authority the author, or his assignee, of an unpublished play, has a right of property in the manuscript and its incorporeal contents; that is, in the words, ideas, sentiments, characters, dialogue, descriptions, and their connection, independent of statutes, and that a court of equity can protect it."

<sup>7</sup> *Shook v. Daly*, 49 How. Pr., 366.



a theater, or permitting it to be acted upon the stage, does not constitute such a publication as to deprive the author or owner of the play of his common law or proprietary right therein, or to debar him from relief by injunction against the infringement of that right.<sup>8</sup> And when plaintiff has the literary proprietorship of a manuscript play, but no statutory copyright, although she has publicly performed it at her theater with the intention of continuing such performance, if defendants, against plaintiff's will, produce the play at another theater, having obtained it by taking advantage of a breach of confidence committed by a person in plaintiff's employ, a bill may be maintained for equitable relief.<sup>9</sup> And one who has possessed himself of the words and arrangement of a drama, from persons who have seen it publicly performed, will be restrained from its publication without the author's consent.<sup>10</sup> So the acting or representing a play

<sup>8</sup> *Macklin v. Richardson*, Amb., 694; *Keene v. Wheatley*, 9 Am. Law. Reg., 33; *Palmer v. Dewitt*, 2 Sweeny, 530; S. C., 3 Albany Law Journal, 54, affirmed on appeal to the Court of Appeals, 47 N. Y., 532. See *Keene v. Clarke*, 5 Rob. (N. Y.), 38; *Roberts v. Meyers*, 23 Monthly Law Reg., 396.

<sup>9</sup> *Keene v. Wheatley*, 9 Am. Law Reg., 33. See *Keene v. Clarke*, 5 Rob. (N. Y.), 38.

<sup>10</sup> *Palmer v. Dewitt*, 2 Sweeny, 530; S. C., 3 Albany Law Journal, 54, decided in the Superior Court of New York City, General Term, affirmed on appeal to the Court of Appeals, 47 N. Y., 532. And see as to unauthorized representations of a play, *Morris v. Kelly*, 1 Jac. & W., 481. In *Palmer v. Dewitt* complainant alleged that he had purchased the exclusive right of producing in the United States an

unpublished comedy called "Play"; that the play had been produced by the author in England and by complainant in the United States, but with no intention of abandoning it, or of conferring upon any one the right of printing or publishing, and that defendant, in disregard of complainant's proprietary rights, and without his knowledge or consent, had published and sold copies of the drama. The answer of defendant denied that the public representation of the play by the author did not confer upon or abandon to defendant the right of publishing, and alleged that the play had been many times performed in public in England, without any notice or prohibition to the spectators against carrying it away, by memory or otherwise, and using or publishing it. Defendant fur-

ther alleged that he received the words of the play and its arrangement, divisions and stage directions from persons who had obtained them by witnessing its performance on the stage as spectators. Monell, J., delivering the opinion of the Superior Court, General Term, says: “\* \* \* There can be no fixed rule determining when an author has surrendered his literary property. Printing his composition, and giving it public circulation, would fix the period of surrender in such a case; but one reading of a manuscript lecture, or one performance of a manuscript play, would not; and if one does not, what greater number, can it be said, will? The value, to the author, of a lecture or of a play, who derives emolument from its delivery or representation before public audiences, is not limited to one performance. It may extend to any greater number, and the hundredth performance may bring more ample returns than the first. So that it may fairly be assumed that it is not intended, in any case, to surrender property in a literary composition so long as the author of it retains it in manuscript, and uses it before the public for his private pecuniary benefit. Therefore I think there can be no presumption against literary ownership arising from the mere frequency of performance. Such performances are not inconsistent with a continued proprietorship, but are wholly consistent with, and necessary to, the enjoyment of the property. \* \* \* Upon the

subject of publication, I will here refer to some of the cases, either holding or sustaining that a representation of a play is not necessarily a publication of it, so as to deprive the author of his property in it. Judge Sprague so held in *Roberts v. Meyers*, 23 Monthly Law Reg., 396. He said it was not a publication within the meaning of the copyright law, and did not prevent an author from obtaining a copyright. It is affirmed by Judge Hoar, in *Keene v. Kimball*, 23 Monthly Law Reg., 669, where he says: ‘The representation of a dramatic work upon the stage is not a publication which will deprive the author or his assignees of their right of property.’ In *Bartlette v. Crittenden*, 4 McLean, 300, 5 Ib., 32, it was held that the author of a lecture did not dedicate the manuscript to the public by using it for the purpose of instructing others. That case went further, and decided that an author did not abandon his right in his composition by permitting pupils or friends to take copies; and that such copies could not be used in any way not contemplated by the author. And in *Blunt v. Patten*, 2 Paine, 397, a deposit by the author of his work in a public office, such as a chart in the navy department, was held not to make it a public document, which any one might copy. And, again, in *Boucicault v. Wood*, 16 Am. Law Reg., 539. In a very recent case (*Crowe v. Aiken*, 2 Biss., 208), decided by Judge Drummond, in the circuit court of the United States for the district of Illinois, an in-

junction was asked for to restrain the representation by the defendant of the play called 'Mary Warner.' The play was written by Mr. Taylor for Miss Bateman, and the manuscript was transferred to the plaintiff. It was publicly represented in London and in the United States, but was not printed. The defendant alleged that the play was obtained from a person in London, who procured it from repeated representations on the stage at the Haymarket Theater, and that there was 'no restriction' against any of the spectators using such play as they saw fit. After a lengthened examination of the questions, the court decided to grant the injunction. In the opinion, the ground is distinctly taken that a representation is not a publication, and any manner of obtaining it, without the consent of the author or owner, 'except by memory,' is a violation of his proprietorship. As far, therefore, as this case depends upon an actual or constructive publication of the play by the plaintiff or his assignee, the clear weight of authority is, that public representation is not publication, and does not entitle any person, without the author's consent, to procure it in any way for purposes of publication, except, perhaps, when it is procured by means of the memory alone. I am aware that in the case of *Keene v. Wheatley*, 9 Am. Law Reg., 92, which is followed by *Keene v. Clarke*, 5 Rob. (N. Y.), 38, and again by *Crowe v. Aiken*, each of the learned judges leans to the opinion that an audi-

tor may use his memory as a means of procuring a represented play, and may then lawfully print and publish it. The reason seems to be, that as there can be no power over or restriction of the use of the memory, therefore, such use is not unlawful. It is enough, however, perhaps, for the present case, to say that, even if it is true that an auditor at a public representation may lawfully carry away the play in his memory, and afterward put it in writing, and from such writing print and publish, there was no evidence in this case to bring it within that rule. The finding of the court is, that the defendant received the words of the comedy, etc., from one or more persons who had seen or heard it performed. That finding is not enough to justify the conclusion that the person or persons who saw or heard the public performance had brought it in their memories from the theater.

"The burden of proving the manner in which the play was procured was upon the defendant, and he was bound to show that he had obtained it in a lawful way. There are no presumptions in his favor. The right of the plaintiff as owner, before publication, was absolute, and could be defeated only by showing that the defendant had obtained the play through the memory of an auditor. This is the result of the learned opinion of Judge Cadwallader in *Keene v. Wheatley*, *supra*, in which view he has fortified himself by the citation of many cases; and also of Judge Drummond, in *Crowe v.*

Aiken, *supra*. But I am compelled to dissent from the opinions of the learned judges in those cases, so far as it is intimated that a spectator may, upon witnessing the public performance of a play, rightfully commit it to memory, and then publish it to the world; and also from a qualified view of the same character, entertained by the learned late chief justice of this court, as expressed in his opinion in *Keene v. Clarke, ubi supra*. It seems to me that any surreptitious procuring of the literary property of another, no matter how obtained, if it was unauthorized and without the knowledge or consent of the owner, and obtained before publication by him, is an invasion of his proprietary rights, if the property so obtained is made use of to his injury. Each of the learned justices admits that a play can not lawfully be taken down by a shorthand writer from the lips of the actors during a public performance. If taken thus by a stenographer, is it different, in its legal effect and resulting consequences, from committing to memory and afterward writing it out? In principle it is not. They are only different modes of doing the same thing, and if without the author's consent are alike injurious to his interests. The objection is not to the committing a play to memory, for over that no court can exercise any control, but in using the memory afterward as the means of depriving the owner of his property. Such use, it seems to me, is as much an infringement

of the author's common law right of property, as if his manuscript had been feloniously taken from his possession. I can see no difference. In the case of *Prince Albert v. Strange*, 2 DeG. and Sma., 652, a workman employed to take impressions from copper plates of etchings made by the plaintiff, not intended for publication, took impressions for himself and sold them to the defendant. It was held an infringement of the plaintiff's proprietary right, and an injunction was granted and the impressions ordered to be destroyed. The pleadings and proofs in this case were shaped so as to bring it within one of the propositions of the learned late chief justice in *Keene v. Clarke*, and it is accordingly found as a fact that the tickets admitting spectators to the performances contained no notice or prohibition against carrying the comedy away, by memory or otherwise, and using and printing the same, nor was any notice to that effect posted in the theater in the view of the spectators. Whatever means a prudent man may adopt to prevent his property from being feloniously taken from him, it can not, I think, be successfully contended, that if he chooses to take the risk, he may not leave it exposed, without mark or other sign to designate it as his property; or that, by thus exposing it, he would lose his title, and could not afterward recover it, or its value, from one who tortiously took it. A wrongdoer can not get title to property, or escape the responsi-

bility of his tortious or felonious act, merely because the owner has failed to give public notice or warning that it was not to be stolen. If carrying away in the memory of a spectator, or otherwise surreptitiously obtaining the contents of a play, is without the consent of, or unauthorized by the owner, and therefore an infringement of his property in the play, the act is not excused by the omission of the owner to notify the audience that they will not be allowed, or are forbidden, to carry it away in that manner. Upon a careful consideration, therefore, of the subject, I have not been able to appreciate the distinction which the learned judges in *Keene v. Wheatley* and *Keene v. Clarke and Crowe v. Aiken* have attempted to draw between different modes of obtaining the contents of a manuscript play from its public performance. They are equally objectionable, and are merely different modes of depriving an author of his literary property; and therefore any mode which effectuates that purpose is unlawful. The Vice Chancellor says, in *Prince Albert v. Strange*, *supra* (p. 689), that as to property of a private nature, which the owner, without infringing on the right of any other, may and does retain in a state of privacy, a person who, without the owner's consent, express or implied, acquires a knowledge of, can not lawfully avail himself of the knowledge so acquired to publish, without his consent, a description of the property. That

opinion goes quite as far as is necessary to destroy the distinction alluded to. There is another case to the same effect. In *Turner v. Robinson*, 10 Irish Ch., 121, a painting, on public exhibition for private emolument, was seen by spectators, some of whom from recollection, arranged themselves in tableau, representing the figures in the painting, and were photographed. The sale of engravings made from such photographs was restrained by injunction. The mode adopted for carrying into execution what was denounced by the court as an unlawful act was the same in the Irish case as was approved of in the two cases alluded to, namely, in the memories of the spectators; and the case is therefore opposed as an authority, to the distinction referred to. My conclusions upon the whole case are, that there was no such publication by the plaintiff, or by his assignor, of the play in question, as to deprive plaintiff of his common law right of property in it; that public representations of the play were not a publication of the play so as to take away such common law right; that there is no presumption in favor of the lawfulness of the manner in which the defendant obtained the play; that the burden is upon him to show that it came into his possession in a lawful manner; and that, having failed to show the lawfulness of his possession, he should be deprived of it. I am therefore of opinion, that the plaintiff is entitled to a judgment

at a theater is not such a publication as to preclude the author from taking out a copyright and obtaining protection by injunction against its infringement.<sup>11</sup>

§ 1040. **Different doctrine in England.** In England, however, it is held that the author of a dramatic work which has been first represented upon the stage in a foreign country is not entitled to an exclusive right of representation, nor to protection by injunction against an unauthorized production of his play, its representation upon the stage of a foreign country being a publication within the meaning of the statute,<sup>12</sup> which denies copyright to the author of a dramatic or musical composition which is first published out of Great Britain. And it is held, under such statute, that a dramatic composition is published, that is, made public, the moment it is represented or acted upon the stage.<sup>13</sup>

§ 1041. **Unauthorized production of play enjoined.** The unauthorized publication of a play from its representation at a theater, or its production at a theater other than that authorized by the owner of such play, constitutes a piracy for which redress may be sought in equity.<sup>14</sup> And the fact that plaintiffs have permitted other persons, under contract, to publish a novel founded upon the incidents of a drama which they seek to protect by injunction, is not such a dedication to the public or such an abandonment of their right of exclusive representation as to prevent the granting of an

restraining the defendant from further printing or publishing the play, and requiring him to deliver up to be destroyed such as are now in print, and that, therefore, the judgment appealed from should be reversed."

<sup>11</sup> Roberts v. Meyers, 23 Monthly Law Reg., 396.

<sup>12</sup> 7 Vict., ch. 12, sec. 19.

<sup>13</sup> Boucicault v. Chatterton, 5

Ch. D., 267; Boucicault v. Delafield, 1 Hen. & M., 597.

<sup>14</sup> Morris v. Kelly, 1 Jac. & W., 481. As to the right to enjoin the unauthorized publication of a play which plaintiff has not himself printed, but has only permitted to be represented at a theater for his own benefit, see Boucicault v. Hart, 13 Blatch., 47.

injunction for the protection of their rights. If, therefore, in such a case, the *prima facie* case made out by the bill and affidavits is not overcome by the answers or affidavits of defendants presented in opposition to the motion for an injunction, the relief will be allowed.<sup>15</sup>

§ 1042. **Adaptation protected.** A court of equity will lend its aid by injunction to protect a dramatic composition which is itself an adaptation from another, but with a new and different result attained by original and independent labor. For example, the owner of the manuscript of an original adaptation of a play, produced in a foreign country, and which is re-cast and changed by original labor to adapt it to the American stage, may be protected by injunction against its infringement. And it is not essential, in such case, that the manuscript shall be the exclusive work of one person; since the same reasons which warrant protection to the individual author will extend it to all whose joint action may contribute to the result finally attained.<sup>16</sup>

§ 1043. **Memorization of play; conflict of authority.** Upon the question whether an unlicensed performance of a manuscript play may be lawfully effected by preserving and reproducing it through the memory of spectators, who have been witnesses of its authorized representation upon the stage, the authorities are somewhat conflicting. By some most respectable courts countenance and approval have been given to the proposition that such memorization of a play or drama is lawful, and that equity will not restrain its reproduction through the sole medium or agency of the memory of witnesses or spectators. The doctrine as thus asserted is founded upon the assumption that the spectators of a public theatrical performance are entitled to use the faculty

<sup>15</sup> *Shook v. Rankin*, 3 Cent. L. J., 210, United States Circuit Court, District of Minnesota, 1875.      <sup>16</sup> *French v. Maguire*, 55 How. Pr., 471.

which is necessarily addressed by such representation, viz., the memory, for the purpose of preserving the play and reproducing it, when the owner has imposed no inhibition or restraint upon such method of retention and reproduction.<sup>17</sup> Upon principle, however, it is difficult to perceive any satisfactory reasoning upon which the doctrine can be supported. It is conceded that the reproduction of a drama by any other unauthorized means than the spectator's memory, as by taking it down in short-hand, is illegal and constitutes sufficient foundation for relief by injunction.<sup>18</sup> And no satisfactory distinction can be perceived between the use of short-hand or other like means of preserving the play, and its memorization as a means of reproduction; nor can any sufficient reason be assigned for refusing relief in the one case, and allowing it in the other. And the later and better considered authorities have denied the distinction above stated, and have established by express adjudication, what is certainly the true doctrine upon principle, that the taking and carrying away of an unpublished play by memory, from its representation upon the stage, and its reproduction without the owner's consent constitute such an infringement of his proprietary rights as to entitle him to relief by injunction.<sup>19</sup>

<sup>17</sup> *Keene v. Kimball*, 16 Gray, 545; *Crowe v. Kimball*, 16 Gray, 545; *Crowe v. Aiken*, 2 Biss., 208.

And the same doctrine has been asserted or countenanced in the following cases, although it does not appear to have been necessary to a decision of the questions involved: *Keene v. Wheatley*, 9 Am. Law Reg., 33; *Keene v. Clarke*, 5 Rob. (N. Y.), 38; *Crowe v. Aiken*, 2 Biss., 208.

<sup>18</sup> See *Macklin v. Richardson*, Amb., 694; *Keene v. Wheatley*, 9 Am. Law Reg., 33; *Keene v. Clarke*, 5 Rob. (N. Y.), 38; *Keene v. Kimball*, 16 Gray, 545; *Crowe v. Aiken*, 2 Biss., 208.

<sup>19</sup> *French v. Conelly*, 1 N. Y. Weekly Dig., 196; *Palmer v. DeWitt*, 2 Sweeny, 530; S. C., 3 Albany Law Journal, 54, affirmed on appeal, 47 N. Y., 532. And see especially the opinion of Monell, J., in *Palmer v. DeWitt*, as reported in 2 Sweeny and 3 Albany Law Journal. In *French v. Conelly*, Curtis, J., very clearly enunciates the true doctrine as follows, p. 197: "The next claim of



§ 1044. **Strict compliance necessary with conditions precedent to statutory copyright.** The investigation of the doctrines governing equitable relief for the protection of dramatic compositions has thus far been principally with reference to cases where protection is sought for the common law or proprietary right in an unpublished drama, rather than to cases where protection is invoked in aid of dramatic copyright under the statutes. Where, however, instead of seeking protection for a dramatic composition upon the proprietary right in the unpublished manuscript, the owner of the play seeks to protect it as a copyrighted work under the statutes, he must show a compliance with the conditions fixed by statute as necessary to a valid copyright in a published work. Not only is it necessary that the title-page should be filed on or before the day of publication, as required by law, but the

the defendants is, that even if their version was made from memory, or a witnessing the representation upon the stage of the original play, they have the right to avail themselves of this course. The Court of Appeals, all the judges concurring, held in *Palmer v. DeWitt*, 47 N. Y., 532, that the property of an author or his assigns in an unpublished MS. is protected and governed by its use, enjoyment and transfer, the same as other personal property, and that the representation upon the stage of a dramatic composition did not affect the MS. and the rights of the author therein, and was not an abandonment or dedication of it to the public; but the court did not pass upon the question how far a spectator witnessing a play might lawfully commit it to memory and then publish it to the world. Learned

judges have differed upon this latter question; but it would seem to better accord with justice and good morals that the carrying away in memory, or in the stenographic notes of a spectator, of the contents of a play unauthorized by the owner, is an infringement of his proprietary rights. It is a surreptitious mode of procuring the literary property of another, and when done from motives of gain, at the expense of the owner, is not defensible. \* \* \* These views were sustained by the majority of the judges at the General Term of this court in *Palmer v. DeWitt*, 2 Sweeny, 530, and seem to be applicable to so much of the case as rests upon the statements of the defendant Pillett as to what he reproduced in the defendant's version from memory."

work must be actually published within a reasonable time after filing the title-page, and two copies of the published work must be sent to the Librarian of Congress as required.<sup>20</sup> Where, therefore, the title-page was filed in October, 1874, and the bill for injunction, which was filed in February, 1875, failed to allege any publication of the work, or any delivery of printed copies after publication to the Librarian of Congress, the bill was held demurrable because of such omission. Nor is it a sufficient averment of compliance with the statute in this respect to allege in the bill in general terms, that plaintiff has in all respects complied with the requirements of the statute, since this is not an averment of fact, but only of a legal conclusion or inference.<sup>21</sup> But upon a bill to enjoin the piracy of a copyrighted play, under the former statute requiring a deposit of the title-page with the clerk of the United States district court for the district, the certificate of the clerk that the title had been deposited in conformity with the act of Congress was held to be *prima facie* evidence that the title deposited was such as the statute required.<sup>22</sup>

§ 1045. **Title of play not protected; when title of novel not infringed by use as name of play.** One who has copyrighted a dramatic composition under a given title, such as the word "Charity," can not enjoin another from producing an entirely different play under a similar title, in the absence of bad faith, the use of such word as a designation of any work of literature or art not being subject to be monopo-

<sup>20</sup> Boucicault v. Hart, 13 Blatch., 47; S. C., 22 Int. Rev. Rec., 150, 8 Chicago Legal News, 257; Carillo v. Shook, 22 Int. Rev. Rec., 152; S. C., 8 Chicago Legal News, 258. But see, *contra*, Roberts v. Meyers, 23 Monthly Law Reg., 396; Boucicault v. Fox, 5 Blatch., 87; Boucicault v. Wood, 2 Biss., 34.

See also Shook v. Rankin, 6 Biss., 477; S. C., 8 Chicago Legal News, 345.

<sup>21</sup> Boucicault v. Hart, 13 Blatch., 47; S. C., 22 Int. Rev. Rec., 150, 8 Chicago Legal News, 257.

<sup>22</sup> Roberts v. Meyers, 23 Monthly Law Reg., 396.

lized by any one person.<sup>23</sup> So a person who deposits in the office of the Librarian of Congress the title of a drama not original with himself, but which is taken from a novel of the same title, can not thereby secure to himself such title to the exclusion of others who have applied the same title to a dramatic composition founded upon the same story, before the date of such deposit; and the plaintiff, in such case, will be denied relief by injunction against the representation by defendant of his play under the title in question.<sup>24</sup> And the title of a copyrighted novel is not infringed by the use of the same title as the name of a dramatic production which does not present any of the scenes, incidents or plot of the novel or any colorable imitation of them, and relief against such a production will therefore be denied.<sup>25</sup>

§ 1046. **Dramatization of novel; colorable imitation; parties in pari delicto.** The production of a play which represents the characters, plot, incidents, dramatic situations and dialogue of a copyrighted novel constitutes an infringement of the copyright and will accordingly be enjoined.<sup>26</sup> So where the owner of the copyright in a dramatic composition writes a novel founded upon such play and transfers to the novel several scenes from the play, and defendant afterward dramatizes the novel, taking the same scenes therefrom, he is guilty of such an infringement as to justify relief by injunction.<sup>27</sup> If, however, plaintiff fails to make sufficient proof of his title, either by authorship or purchase, and the facts indicate that his play is merely a colorable imitation of that which he seeks to enjoin, the relief will be denied. So if it appears to the court that both parties are wrong-doers and *in pari delicto*, equity will decline to interfere.<sup>28</sup>

<sup>23</sup> Isaacs v. Daly, 39 N. Y. Superior Ct., 511. See, *post*, § 1079.

<sup>24</sup> Benn v. Leclercq, 18 Int. Rev. Rec., 94.

<sup>25</sup> Harper v. Ranous, 67 Fed., 904.

<sup>26</sup> Harper v. Ranous, 67 Fed., 904.

<sup>27</sup> Reade v. Lacy, 1 John. & H., 524; S. C., 30 L. J. N. S. Ch., 655.

<sup>28</sup> Martinetti v. Maguire, 1 Abb. U. S. R., 356; S. C., 1 Deady, 216.

§ 1047. **Scenic or spectacular effects.** The authorities are not wholly reconcilable as to the right to relief by injunction for the protection of merely scenic or spectacular effects upon the stage, independent of literary composition. Upon the one hand, it is held that mere spectacles or arrangements of scenic effects, commonly called spectacular dramas, without literary character, are not dramatic compositions within the meaning of the act of Congress so as to entitle them to protection as literary property, and that equity will not, therefore, interfere by injunction for their protection.<sup>29</sup> If the refusal to interfere in such cases is based upon the immoral or indecent nature of the spectacle in question, the doctrine is not inconsistent with either principle or authority.<sup>30</sup> But it is difficult to perceive any satisfactory rea-

<sup>29</sup> *Martinetti v. Maguire*, 1 Deady, 216; S. C., 1 Abb. U. S. R., 356, where an injunction was refused which was sought to restrain the reproduction of the spectacular play known as the "Black Crook."

<sup>30</sup> In *Martinetti v. Maguire*, *supra*, the refusal to interfere was also based upon the immorality and indecency of the spectacle in question. "The Black Crook," says Deady, J., "is a mere spectacle—in the language of the craft, a spectacular piece. The dialogue is very scant and meaningless, and appears to be a mere accessory to the action of the piece—a sort of verbal machinery tacked on to a succession of ballet and tableaux. The principal part and attraction of the spectacle seems to be the exhibition of women in novel dress or no dress, and in attractive attitudes or action. The closing scene is called Paradise,

and, as witness Hamilton expresses it, consists mainly 'of women lying about loose,' a sort of Mohammedan paradise, I suppose, with imitation grottoes and unmaidenly houris. To call such a spectacle a 'dramatic composition' is an abuse of language, and an insult to the genius of the English drama. A menagerie of wild beasts, or an exhibition of model artists, might as justly be called a dramatic composition. Like those, this is a spectacle; and although it may be an attractive or gorgeous one, it is nothing more. In my judgment, an exhibition of women 'lying about loose,' or otherwise, is not a dramatic composition, and therefore not entitled to the protection of the copyright act." It is, however, to be observed that *Martinetti v. Maguire* was decided under the act of Congress of August 18, 1856, 11 Statutes at Large,

son why particular and striking scenes or stage effects of a drama, not of an immoral or indecent nature, are not entitled to the same protection in equity as the purely literary portions of the play. And the true doctrine undoubtedly is that the protection which is extended to dramatic compositions is not limited to the dialogue or literary part of the composition, but extends also to scenic effects and particular scenes or stage situations, and that there may be such a piracy of a particular scene from a play as to warrant relief by injunction. And when all that is substantial and material in a scene from plaintiff's copyrighted play is taken by defendant and used in the same order and sequence of events, and in such manner as to convey the same sensations and impressions upon spectators as the corresponding scene in plaintiff's play, equity will interpose by injunction to prevent such a piracy upon plaintiff's rights.<sup>31</sup>

138, which granted protection to dramatic compositions "designed or suitable for representation." These words are not found in the act of July 8, 1870, now embodied in the Revised Statutes.

<sup>31</sup> *Daly v. Palmer*, 6 Blatch., 256; *Daly v. Webster*, 4 C. C. A., 10, 56 Fed., 483. In *Daly v. Palmer*, plaintiff, being the owner of a copyrighted play known as "Under the Gaslight," filed a bill to enjoin defendant from producing a play called "After Dark," the injunction being especially sought to prevent defendant from representing in his play a particular scene known as the "railroad scene" in "Under the Gaslight." In plaintiff's play this scene represented a surface railroad, a woman locked in a signal station by the signal man, a man binding another to the track to be killed

by the approaching train, the woman seeing this from a window, breaking open the door with an ax and rescuing the victim from the coming train. Defendant, in "After Dark," produced a scene in which a man thrown into a wine vault sees through a door leading into an adjoining vault two persons put the body of a man, rendered unconscious by drugs, through a hole in the wall, whom they leave insensible upon the track of an underground railway. The man confined enlarges, with an iron bar, an opening in the wall of the vault, and removes the body from the track, a moment before the train passes. The injunction was allowed, Blatchford, J., saying, p. 269: "All that is substantial and material in the plaintiff's 'railroad' scene' has been used by Boucicault; in the

§ 1048. **Immoral play not protected.** It would seem that if the play for whose protection the aid of equity is invoked is an immoral production, the court will not lend its aid by injunction to prevent its infringement, since the rights of the author are secondary to the right of the public to be

same order and sequence of events, and in a manner to convey the same sensations and impressions to those who see it represented, as in the plaintiff's play. Boucicault has, indeed, adapted the plaintiff's series of events to the story of his play, and in doing so has evinced skill and art; but the same use is made in both plays of the same series of events, to excite by representation the same emotions in the same sequence. There is no new use, in the sense of the law, in B.'s play, of what is found in the plaintiff's 'railroad scene.' The 'railroad scene' in B.'s play contains everything which makes the 'railroad scene' in the plaintiff's play attractive as a representation on the stage. As in the case of a musical composition, the air is the invention of the author, and a piracy is committed if that in which the whole meritorious part of the invention consists is incorporated in another work, without any material alteration in sequence of bars, so in the case of a dramatic composition designed or suited for representation, the series of events directed in writing by the author, in any particular scene, is his invention, and a piracy is committed if that in which the whole merit of the scene consists is incorporated in another work, without any material alteration in the constituent parts of the series of events, or in the sequence of the events in the series. The adaptation of such series of events to different characters who use different language from the characters and language of the first play, is like the adaptation of the musical air to a different instrument, or the addition to it of variations or of an accompaniment. The original subject of invention, that which required genius to construct it and set it in order, remains the same in the adaptation. A mere mechanic in dramatic composition can make such adaptation, and it is a piracy if the appropriated series of events when represented on the stage, although performed by new and different characters, using different language, is recognized by the spectator through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in the mind in the same sequence or order. Tested by these principles, the 'railroad scene' in B.'s play is undoubtedly when acted, performed, or represented on a stage or public place, an invasion or infringement of the copyright of the plaintiff in the 'railroad scene' in his play.

protected from what is subversive of good morals.<sup>32</sup> But when, upon an examination of the original manuscript of plaintiff's play, the charge of immorality is not sustained, the infringement of the play will be enjoined.<sup>33</sup>

§ 1049. **Unpublished manuscripts protected by act of Congress.** The doctrine of equitable protection as extended in favor of the common law or proprietary right in an unpublished drama in manuscript, independent of statute, has already been fully considered. Under the act of Congress of July 8, 1870, provision is made for the protection of unpublished manuscripts, thus affirming by statute the common law right.<sup>34</sup> And under this statute the printing and publishing by defendant of a considerable portion of plaintiff's

The substantial identity between the two scenes would naturally lead to the conclusion that the later one had been adapted from the earlier one. The charge of actual plagiarism on the part of B. made in the bill is not denied. It is hardly possible that the resemblances are accidental, and that the differences are not merely colorable with the view to disguise the plagiarism. The true test of whether there is a piracy or not, is to ascertain whether there is a servile or evasive imitation of the plaintiff's work, or whether there is a *bona fide* original compilation, made up from common materials and common sources, with resemblances which are merely accidental or result from the nature of the subject. *Emerson v. Davies*, 3 Story, 768, 793."

<sup>32</sup> *Shook v. Daly*, 49 How. Pr., 366; S. C., 1 N. Y. Weekly Dig., 198; *Martinetti v. Maguire*, 1

*Deady*, 216; S. C., 1 Abb. U. S. R. 356.

<sup>33</sup> *Shook v. Daly*, 49 How. Pr., 366; S. C., 1 N. Y. Weekly Dig., 198.

<sup>34</sup> The provision in question is found in Section 4967 of the Revised Statutes, which enacts that, "every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained, if such author or proprietor is a citizen of the United States, or resident therein, shall be liable to the author or proprietor for all damages occasioned by such injury." The act of March 3, 1891, c. 565, § 9, 26 Stat., 1109, amends this section by striking out the words "if such author or proprietor is a citizen of the United States, or resident therein." The statute is now in force as thus amended. 3 U. S. Comp. Stat. 1901, p. 3416.

manuscript play, and the announcement of his intention to sell copies of the same, constitute sufficient ground for enjoining such printing and publication.<sup>35</sup>

§ 1050. **Translation protected.** The protection which is extended by courts of equity to authors under the copyright laws is not limited to original works, but extends also to translations. When, therefore, a foreign play has been translated into English and adapted to the stage and copyrighted in this country, with the author's consent, the owner of the copyright in such translation is entitled to an injunction to restrain a piracy upon his work.<sup>36</sup>

§ 1051. **Injunction against publication of manuscript.** An injunction is proper to restrain the publication in a magazine of a play which the author has kept in manuscript and never published, and which he has not allowed to be acted upon the stage except with his permission.<sup>37</sup> But a perpetual injunction has been refused against the publication of a periodical work devoted to theatrical criticism, in which defendant had published certain extracts from plain-

<sup>35</sup> *Boucicault v. Hart*, 13 Blatch., 47; S. C., 22 Int. Rev. Rec., 150.

<sup>36</sup> *Shook v. Rankin*, 6 Biss., 477; S. C., 8 Chicago Legal News, 345. Drummond, J., in granting the injunction, says, 6 Biss., p. 479: "D'Ennery and Cormon were the authors of a drama in the French language called 'Les Deux Orphelines'; Jackson translated it into English and adapted it to representation on the stage. This was with the consent of the authors. After this was done he applied under the law for a copyright; and the question is whether there was any valid objection to his obtaining a copyright for the play thus translated into English. I

do not see that there was. He was the translator of the play. He adapted it to representation on the stage, and was, in the sense of the law, the author of that for which he obtained a copyright. No one could complain of this, except the authors of the play in French, and it affirmatively appears that they assented to this action on the part of Mr. Jackson. Then I do not see why he was not protected under the law for his translation and adaptation of the work to the stage, and of which he was in one sense the author."

<sup>37</sup> *Macklin v. Richardson*, Amb., 694.



tiff's play with criticisms thereon, the case being regarded as not sufficiently free from doubt to warrant the relief.<sup>38</sup>

§ 1052. **Deposit of money in lieu of injunction.** An application for a preliminary injunction to restrain the production of an unpublished play upon the stage has been refused, upon defendants depositing a sum of money equal to the amount for which plaintiff had been willing to license the performance of the play by defendants, with a sufficient sum in addition thereto to cover the costs of the litigation.<sup>39</sup>

<sup>38</sup> *Whittingham v. Wooler*, 2 Swanst., 428.      <sup>39</sup> *Keene v. Wheatley*, 9 Am. Law Reg., 33.

## IV. MUSICAL COMPOSITIONS.

§ 1053. Test to be applied.

1054. What constitutes an author; infringement of opera.

1055. Piracy of song enjoined; when action at law required.

1055*a*. Reproduction by mechanical means; pianola roll.

1056. Effect of laches.

§ 1053. **Test to be applied.** The general principles which have been already discussed, as governing equitable interference for the protection of literary and dramatic compositions, are believed to be equally applicable to cases where it is sought to protect a musical composition from piracy or infringement, although the aid of equity has been less frequently invoked in the latter class of cases than in the former. The true test to be applied in determining whether such a piracy has been committed upon a musical composition as to entitle plaintiff to relief by injunction is, whether the music appropriated by defendant may be recognized by the air as that of plaintiff, and whether the air which is taken is substantially the same as the original. And the publication by defendant in the form of waltzes and quadrilles of a considerable and material portion of the air of plaintiff's copyrighted opera, constitutes such an infringement of plaintiff's rights as will be enjoined, even though defendant may have made material additions to the air and adapted it to a different purpose from the original.<sup>1</sup>

<sup>1</sup> *D'Almaine v. Boosey*, 1 Y. & C. Exch., 288. Lord Chief Baron Lyndhurst says, p. 300: "It is admitted that the defendant has published portions of the opera containing the meritorious parts of it; that he has also published entire airs; and that in one of his waltzes he has introduced seventeen bars in succession, containing the whole of the original air, although he does fifteen other bars, which are not to be found in it. Now it is said that this is not a piracy: first, because the whole of each air has not been taken; and secondly, because what the plaintiffs purchased was the entire opera, and the opera consists, not merely of certain airs and melodies, but of the whole score. But, in the first

§ 1054. **What constitutes an author; infringement of opera.** To constitute one an author within the meaning of the copyright law, he must, by his own individual labor applied to the materials of his composition, produce an arrangement or compilation new in itself. And where one takes the music of an opera as written and produced in Europe, and makes

place, piracy may be of part of an air as well as of the whole; and in the second place, admitting that the opera consists of the whole score, yet if the plaintiffs were entitled to the whole, *a fortiori* they were entitled to publish the melodies which form a part. Again, it is said that the present publication is adapted for dancing only, and that some degree of art is needed for the purpose of so adapting it; and that but a small part of the melody belongs to the original composition. That is a nice question. It is a nice question what shall be deemed such a modification of an original work as shall absorb the merit of the original in the new composition. No doubt such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are in their nature original. Every compiler intends to make of them a new use; not that which the author proposed to make. \* \* \* Now it will be said that one author may treat the same subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite distinct from that of others who preceded

him; but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the author, and which may in such case be the subject of piracy; and you commit a piracy if, by taking not a single bar but several, you incorporate in the new work that in which the whole melodious part of the invention consists. \* \* \* It must depend on whether the air taken is substantially the same with the original. Now the most unlettered in music can distinguish one song from another, and a mere adaption of the air, either<sup>o</sup> by changing it to a dance or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear. The adding variations makes no difference in principle."

alterations and additions thereto, and adapts and arranges it, adding new matter of his own and thus producing a new and different result, which he then copyrights, he is entitled to relief in equity.<sup>2</sup> But a dramatic representation by defendants upon the stage, in which a substantial and material part of the music of an opera owned by plaintiff and duly copyrighted is performed, constitutes such an infringement of plaintiff's sole right of performing such music as to justify an injunction; and this is true, even though the operatic score as produced by defendants was obtained by independent labor bestowed upon a pianoforte arrangement of the music, which was made by another person and not copyrighted.<sup>3</sup> Where, however, the libretto and score of a comic opera composed by non-resident alien authors had been published and thereby dedicated to the public, although the orchestration of the opera had been retained in manuscript, and defendant had independently prepared a new orchestration from the published vocal and pianoforte scores, the court refused to enjoin defendant from producing the opera with such orchestration. But it was held, in such case, that defendant might be restrained from so advertising his performance as to lead the public to believe that his orchestration was the original one.<sup>4</sup>

<sup>2</sup> Atwill v. Ferrett, 2 Blatch., 39.

<sup>3</sup> Boosey v. Fairlie, 7 Ch. D., 301. The court, Thesiger, L. J., say, p. 317: "Upon the third point, viz., that of infringement, we are of opinion that a dramatic representation in which a substantial and material part of the music of Offenbach's opera has been performed, constitutes an infringement of the sole right of performing that music, even though the operatic score may have been obtained by independent labor bestowed upon the unprotected pianoforte arrangement

of Soumis. There is scarcely any published opera the score of which is not, within a short time after its first performance, arranged for the piano, and if by reconversion of the pianoforte arrangement into an operatic score, a task which could be executed by any skilled musician, and performance of that score, the penalties of infringement could be escaped, the protection given to operatic compositions would be almost nugatory."

<sup>4</sup> Iolanthe Case, 15 Fed., 439.

§ 1055. **Piracy of song enjoined; when action at law required.** Where the plaintiffs, who were publishers of music in England, published an original song, which was written and composed for them and set to the music of an old American air rearranged for their song, the song being published by plaintiffs under a particular title as sung by a famous singer, whereby it had become very successful and popular, plaintiffs were held to have a property in the title and description of the song. And defendants having published substantially the same melody, with different words but with a similar title-page announcing the song under a similar name and as sung by the same person, an injunction was allowed to restrain such infringement upon plaintiff's rights. But the right to relief in such case rests upon the deception on the part of defendants in holding their goods out to the public as those of plaintiffs, rather than upon any copyright in the production itself.<sup>5</sup> The court may, however, in such case, as a condition of continuing the injunction, require plaintiffs to bring an action at law and to enter into an undertaking to be answerable in damages.<sup>6</sup> And where it is sought to restrain the infringement of a musical composition, but the evidence is conflicting as to the originality of the work, a decision upon the question of the injunction may be suspended or withheld, in order that an issue at law may be tried to test the question of fact.<sup>7</sup>

§ 1055 *a*. **Reproduction by mechanical means; pianola roll.** The ownership of a copyright in a musical composition confers upon the proprietor the exclusive right merely to multiply copies of the particular musical sheets and of the notes, bars and other such matter appearing upon them, and does not give the exclusive right to the sounds represented by

<sup>5</sup> *Chappell v. Sheard*, 2 Kay & J., 117; S. C., 1 Jur. N. S., 996, 3 W. M. & G., 1.  
<sup>6</sup> *Chappell v. Davidson*, 8 DeG., R., 646; *Chappell v. Davidson*, 2 Kay & J., 123.  
<sup>7</sup> *Jollie v. Jaques*, 1 Blatch., 618.

such sheets or the right to prevent the reproduction of such sounds by mechanical means. Accordingly the sale by defendant of a devise consisting of a perforated roll of paper to be used in a piano for the purpose of reproducing plaintiff's music by means of a mechanical devise attached to the piano and which in itself conveys to an observer no idea of the music, constitutes no infringement of plaintiff's copyright in the music and such sale will therefore not be enjoined. Nor does the placing upon such rolls of words taken from plaintiff's music sheets to indicate the manner in which the music is to be rendered and the expression to be given to it, constitute an infringement and the relief will accordingly be denied in such case also.<sup>8</sup>

§1056. **Effect of laches.** Upon the question of plaintiff's acquiescence or laches as affecting his right to equitable relief in the class of cases under consideration, it is held that where he has permitted several persons to publish his musical compositions, some of them for a period of fifteen years, while such laches is not of itself a justification of the infringement, it is a circumstance which will lead a court of equity to refuse its aid by injunction in the first instance.<sup>9</sup> And although the *onus* of proving such laches on the part of plaintiff as to estop him from relief by injunction rests upon defendant in the first instance, yet if laches be shown plaintiff must purge himself therefrom before he will be allowed preventive relief.<sup>10</sup>

<sup>8</sup> *Boosey v. Whight*, 69 L. J. N. S. Ch., 66.

<sup>10</sup> *Chappell v. Sheard*, 1 Jur. N. S., 996; S. C., 2 Kay & J., 117, 3

<sup>9</sup> *Platt v. Button*, 19 Ves., 447.

W. R., 646.

## V. PARTIES.

- § 1057. Assignee entitled to protection.
- 1058. Executors of law reporter.
- 1059. When publisher protected as assignee.
- 1060. Equitable owner protected.
- 1061. Author, publisher and assigns.
- 1062. Vendor of infringing work enjoined.

§ 1057. **Assignee entitled to protection.** The question of who are proper parties, plaintiff or defendant, for or against whom a court of equity will interfere by injunction for the protection of copyright, frequently becomes one of practical importance in this class of cases. The right to relief by injunction is not limited to the author or original proprietor of a literary or dramatic work, but extends to his assignee, who will be protected in a proper case in like manner and to the same extent that the author himself would have received protection.<sup>1</sup> And when the author of a copyrighted drama assigns the exclusive right to act and represent it in all places throughout the United States, except certain specified localities, for a given period, such assignee is entitled to relief by injunction against an invasion of his right by a defendant who is proceeding without color of authority to produce the play in question; nor in such case is the assignor a necessary party to the action.<sup>2</sup>

§ 1058. **Executors of law reporter.** Where the reporter of law reports contracts with publishers to furnish his reports in manuscript, the publishers to have the copyright to themselves, their heirs and assigns, at a fixed consideration, such agreement will be held to vest the full right of property in the publishers, with the right to renewals under a law subsequently passed providing for an extension of copyright. The executors of such reporter can not, therefore, after his

<sup>1</sup> Crowe v. Aiken, 2 Biss., 208.

<sup>2</sup> Roberts v. Meyers, 23 Monthly Law Reg., 396.

decease, maintain a bill to enjoin such publishers from publishing and selling, especially when the reporter, in his lifetime, had for many years acquiesced in the assertion by defendants of their right to publish and sell under the renewal of the copyright.<sup>3</sup>

§ 1059. **When publisher protected as assignee.** In the case of a contract between an author and publisher for the publication by the latter of a certain number of copies of a work, which in effect gives him its sole publication to the extent of the edition embraced in such contract, the publisher may be treated as an assignee of the copyright in a limited sense, and as such entitled to maintain a bill to enjoin a piracy of the work. And the fact that those portions of the work which have been pirated are contained in previous editions of the same work by the same author will not prevent relief by injunction, when such passages are also contained in the edition in question, and when the entire copyright in all the editions was vested in the author at the time of making such agreement.<sup>4</sup>

§ 1060. **Equitable owner protected.** The province of courts of equity being to afford relief in cases where no remedy exists at law, or where the legal remedy, if any, is inadequate or incapable of being enforced, the possession of the legal title is not indispensable to obtaining relief in equity against the infringement of a copyright, and the courts have been disposed to extend their aid upon the application of persons having only an equitable title.<sup>5</sup> And the assignee of the copyright in a law report is entitled to the protection of his

<sup>3</sup> *Paige v. Banks*, 13 Wal., 608, Sim., 151, where it is held that if affirming S. C., 7 Blatch., 152. the plaintiff's title for which protection is sought by injunction is

<sup>4</sup> *Sweet v. Cater*, 11 Sim., 572.

<sup>5</sup> *Mawman v. Tegg*, 2 Russ., 385; *Chappell v. Purday*, 4 Y. & C., 485; *Hodges v. Welsh*, 2 Ir. Eq. R., 266. merely equitable, the owner of the legal title should be joined as a party to the action.

But see *Colburn v. Duncombe*, 9



rights by injunction, even though at the time of the alleged piracy no written assignment existed, and complainant's title was merely equitable. And in such case, the author's permission to infringe the copyright, given after he has parted with his equitable title for a valuable consideration, constitutes no bar to the relief, it appearing on the title-page of the work that it is published for the equitable assignee and owner of the copyright.<sup>6</sup> So the performance of a play may be enjoined when the copyright has been assigned by the author to persons who afterward assign in writing to complainants, although the original assignment may not have been in writing.<sup>7</sup>

§ 1061. **Author, publisher and assigns.** Where an author and publisher entered into a contract for the publication of a book, the profits to be divided equally between them, it was held that assignees or purchasers claiming title under the publishers were not entitled to enjoin the author from publishing a new edition of the book with another publisher, the agreement in question being treated as of a personal nature, the benefit of which was not assignable by either party without the consent of the other.<sup>8</sup>

§ 1062. **Vendor of infringing work enjoined.** Relief by injunction may properly be allowed against the vendor of a book which constitutes a piracy of plaintiff's work, the vendor in such case being liable for the sale of a book which invades the plaintiff's copyright upon the same principle which renders the vendor of a patent liable for selling the manufactured article without the consent of the patentee.<sup>9</sup>

<sup>6</sup> *Hodges v. Welsh*, 2 Ir. Eq. R., 266.

<sup>8</sup> *Stevens v. Benning*, 6 DeG., M. & G., 223, affirming S. C., 1 Kay

<sup>7</sup> *Morris v. Kelly*, 1 Jac. & W., & J., 168.

481.

<sup>9</sup> *Greene v. Bishop*, 1 Clif., 186.

## CHAPTER XVIII.

### OF INJUNCTIONS AGAINST THE INFRINGEMENT OF TRADE MARKS.

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#### I. NATURE OF THE RIGHT AND ITS INFRINGEMENT.

- § 1063. Nature and definition of trade mark; trade name.
- 1064. Generic and descriptive words; illustrations of rule.
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1084. Accounting.

§ 1063. **Nature and definition of trade mark; trade name.**

A trade mark is a particular word, sign, symbol or device which is used by a person for the purpose of indicating that the article to which it is attached is manufactured or sold by him or by his authority, and which, by exclusive use, becomes recognized as the distinguishing mark of the owner's goods. In order to establish title to a trade mark and to justify relief by injunction, the owner must show an appropriation and use of the word, mark, symbol or device under such circumstances as to publicity and length of use as to manifest an intention to adopt it as a trade mark; and a mere casual use, interrupted and for a brief period, will not support the claim of exclusive ownership.<sup>1</sup> Upon the other hand, long use need not be shown as a condition to obtaining injunctive relief, nor is it necessary that the article should be widely known or that it should have attained a great reputation, provided the use of the trade mark and the intention to adopt it are clear.<sup>2</sup> Nor is it necessary that

<sup>1</sup> Kohler Mfg. Co. v. Beeshore, 8 C. C. A., 215, 59 Fed., 572; Licensed Victuallers N. Co. v. Bingham, 58 L. J. N. S. Ch., 36.

<sup>2</sup> Hall v. Barrows, 32 L. J. Ch., 548; Kathreiner's Maltzkaffe, etc. v. Pastor Kneipp M. Co., 27 C. C. A., 351, 82 Fed., 321. In the lat-

ter case, Jenkins, J., says: "It is not necessary, in our judgment, that a trade in an article should be fully established, in the sense that the article be widely known, before the proprietor of its trade-mark or trade-name may be entitled to the protection of equity

the article should have acquired a general notoriety in the market, by the use of the particular mark adopted, but the right may be established whenever the goods are brought into the market.<sup>3</sup> A trade name differs from a trade mark merely in that it is designed and adopted for the purpose of appealing to the ear rather than to the eye, as in the case of a trade mark. Where, therefore, the similarity in sound between the names in question is so close as to be likely to deceive an ordinary purchaser, relief will be granted notwithstanding the fact that there is no resemblance between the packages or labels to which the names are applied.<sup>4</sup> The object of a trade mark being to denote the origin and ownership of the goods to which it is applied and to distinguish plaintiff's goods from those manufactured or sold by others, a manufacturer can not, with respect to a single article, acquire a valid trade mark in a large number of names applied arbitrarily to different brands of that article for the purpose of designating the size, shape or quality of those brands.<sup>5</sup>

for the preservation of his rights. Otherwise it might be impossible, with respect to a valuable and desirable article or product of manufacture, designated by a particular brand or in a particular manner, ever to establish a trade. Craft and cunning, discerning the value of the product, and the profit to be acquired, would, at the inception of the business, flood the market with spurious and cheaper articles or preparations of the similitude of the genuine, and strangle the trade in the genuine at its birth. It is enough, we think, if the article with the adopted brand upon it is actually a vendible article in the market, with intent by the proprietor to

continue its production and sale. It is not essential that its use has been long continued, or that the article should be widely known, or should have attained great reputation. The wrong done by piracy of the trade-mark is the same in such case as in that of an article of high and general reputation, and of long continued use. The difference is but one of degree, and in the quantum of injury."

<sup>3</sup> *M'Andrew v. Bassett*, 33 L. J. Ch., 561.

<sup>4</sup> *Fairbank Co. v. Luckel Soap Co.*, 42 C. C. A., 376, 102 Fed., 327.

<sup>5</sup> *Albany Perforated W. R. Co. v. Hoberg Co.*, 102 Fed., 157, affirmed in 48 C. C. A., 559, 109 Fed., 589.

§ 1064. **Generic and descriptive words; illustrations of rule.** It is a fundamental rule that words, names or symbols which are generic or are merely descriptive of the article to which they are applied, referring to its nature, kind, quality or ingredients, or to the purpose for which it may be used, and not designating the particular goods of the owner or his particular place of business, are not capable of exclusive appropriation as trade marks as against other persons who with equal truth and with equal right to their use, are applying them as a description of their own goods. To permit the exclusive appropriation of such words would be, in effect, to create a monopoly in the use of the ordinary nouns and adjectives of the English language as against those who, with equal right and truth, are applying them as a description of their own products. In the absence, therefore, of any fraudulent conduct or attempt at misrepresentation upon the part of the defendant, the courts universally decline to interfere by injunction for the protection of words or names of such a character.<sup>6</sup> Thus, if the name used is simply de-

<sup>6</sup> *Brown Chemical Co. v. Meyer*, 624; *Computing Scale Co. v.* 139 U. S., 540, 11 Sup. Ct. Rep., 625, affirming S. C., 31 Fed., 453; *Standard S. C. Co.*, 55 C. C. A., 459, 118 Fed., 965; *Vacuum Oil Parsons v. Gillespie*, App. Cas. Co. v. Climax Refining Co., 56 C. (1898), 239; *Corwin v. Daly*, 7 C. A., 90, 120 Fed., 254; *Rumford Chemical Works v. Muth*, 35 Bosw., 222; *Stokes v. Landgraff*, 17 Barb., 608; *Cooke & Cobb Co. v. Miller*, 169 N. Y., 475, 62 N. E., 35 Fed., 524; *Colgan v. Danheiser*, 582; *Falkinburg v. Lucy*, 35 Cal., 35 Fed., 150; *Harris Drug Co. v. Stucky*, 46 Fed., 624; *Aerators, Limited, v. Tallitt*, (1902) 2 Ch., 561; *Gessler v. Grieb*, 80 Wis., 21, 319. And see *Osgood v. Allen*, 1 48 N. W., 1098, 27 Am. St. Rep., 185. And the trade mark act of February 20, 1905, expressly provides that descriptive words or geographical names shall not be registrable. Section 5 of the act provides that "no mark which consists merely in the name of an individual, firm, corporation, or association, not written, printed,

scriptive of the article, or is the name by which it is generally known in trade, or indicates the general nature of the business, it is not a trade mark within the meaning of the rule.<sup>7</sup> And where the term used is merely an adjective descriptive of the quality of the article manufactured by plaintiff, such as the word "nourishing" applied to his goods, it does not constitute such a trade mark as will be protected in equity by an injunction.<sup>8</sup> Nor does the protection which is afforded by the law of trade marks extend to the use of words which serve only to indicate the name, kind or quality of goods, even though they may be blended with other words indicative of origin or ownership. Where, therefore, the only matter common to both plaintiff's and defendant's label is the term "washing powder," which is the name of the article in question, an injunction will not be allowed, since plaintiff can acquire no exclusive property in the name by which like compounds are known in the market and the use of which is open to all.<sup>9</sup> As further illustrating the principle under discussion, relief has been denied in the following cases of words or phrases which are held to be purely descriptive: "Flaked Oatmeal" as applied to a particular brand of that article;<sup>10</sup> "Cramp Cure" as applied to a cure for cramps;<sup>11</sup> "600" as applied to what

impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual, or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this act."

<sup>7</sup> *Braham v. Bustard*, 1 Hem. & M., 447; *Young v. Macrae*, 9 Jur. N. S., 322. See also *Hostetter v. Fries*, 17 Fed., 620. And see *Lon-*

*don Society v. London Co.*, 11 Jur., 938; *Raggett v. Findlater*, L. R. 17 Eq., 29; *Osgood v. Allen*, 1 Holmes, 185.

<sup>8</sup> *Raggett v. Findlater*, L. R. 17 Eq., 29. In this case the words for which protection was sought were "Nourishing London Stout."

<sup>9</sup> *Falkinburg v. Lucy*, 35 Cal., 52. And see *Gilman v. Hunnewell*, 122 Mass., 139.

<sup>10</sup> *Parsons v. Gillespie*, App. Cas. (1898), 239.

<sup>11</sup> *Harris Drug Co. v. Stucky*, 46 Fed., 624.

is commonly known as 600 oil and indicating its quality of being able to be subjected to a temperature of 600 degrees of heat without burning;<sup>12</sup> "Standard Computing" as applied to scales;<sup>13</sup> "Steel Shod" as applied to shoes studded with steel nails;<sup>14</sup> "Instantaneous" as applied to tapioca and indicating its adaptability for immediate use without the preliminary soaking generally required by that article;<sup>15</sup> "Headache Wafers" as applied to tablets prepared for the cure of headaches;<sup>16</sup> "Fire-Proof" as applied to a high grade of non-explosive illuminating oil;<sup>17</sup> "Cough Remedy" as applied to a medical compound sold as a remedy for coughs;<sup>18</sup> "Rock and Rye" as applied to a compound of rock candy and rye whiskey.<sup>19</sup> So the word "Tycoon" as applied to a particular grade of tea, which, from long use, has come to be known in the trade as referring to that particular grade or brand, is not capable of exclusive ownership as a trade mark and its use will therefore not be protected by injunction.<sup>20</sup>

§ 1064 *a*. **Geographical names.** The same principles which deny relief by injunction against the exclusive use of words which are generic or are purely descriptive in their nature apply to words or names which are geographical. And it may be stated as a general rule that, in the absence of a piracy of the plaintiff's own name or of a fraudulent attempt upon the part of the defendant to appropriate plaintiff's business, a

<sup>12</sup> *Vacuum Oil Co. v. Climax Refining Co.*, 56 C. C. A., 90, 120 Fed., 254.

<sup>13</sup> *Computing Scale Co. v. Standard S. C. Co.*, 55 C. C. A., 459, 118 Fed., 965.

<sup>14</sup> *Brennan v. Emery B. T. Co.*, 47 C. C. A., 532, 108 Fed., 624.

<sup>15</sup> *Bennett v. McKinley*, 13 C. C. A., 25, 65 Fed., 505.

<sup>16</sup> *Gessler v. Grieb*, 80 Wis., 21, 48 N. W., 1098, 27 Am. St. Rep., 20.

<sup>17</sup> *Scott v. Standard Oil Co.*, 106 Ala., 475, 19 So., 71, 31 L. R. A., 374.

<sup>18</sup> *Gilman v. Hunnewell*, 122 Mass., 139. And see this case for an extended collection of authorities upon the subject of trade marks.

<sup>19</sup> *Van Beil v. Prescott*, 82 N. Y., 630.

<sup>20</sup> *Corbin v. Gould*, 133 U. S., 308, 10 Sup. Ct. Rep., 312.

manufacturer can not acquire such a property in the name of the town or place where he is doing business or where his goods are manufactured or sold as to entitle him to an injunction to prevent other manufacturers who may use that name with equal right and truth from so using it to designate the place of manufacture of their goods.<sup>21</sup> And the relief is denied in such cases even though the name in question refers to or is that of an entire country or continent.<sup>22</sup>

§ 1065. **The same.** In accordance with the general doctrine that the name of a particular place as applied to a man-

<sup>21</sup> *Candee v. Deere*, 54 Ill., 439; *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill., 127, 40 N. E., 616; *Canal Co. v. Clark*, 13 Wall., 311; *Columbia Mill Co. v. Alcorn*, 150 U. S., 460, 14 Sup. Ct. Rep., 151; *Elgin National Watch Co. v. Illinois Watch Co.*, 179 U. S., 665, 21 Sup. Ct. Rep., 270, affirming S. C., 35 C. C. A., 237, 94 Fed., 667, which reversed S. C., 89 Fed. 487; *Piper v. Laughman*, 128 Pa. St., 1, 18 Atl., 415, 5 L. R. A., 599; *Blackwell v. Wright*, 73 N. C., 310; *Telephone Mfg. Co. v. S. T. Mfg. Co.*, 63 S. C., 313, 41 S. E., 322; *Hoyt v. J. T. Lovett Co.*, 17 C. C. A., 652, 71 Fed., 173, 31 L. R. A., 44; *Morgan Envelope Co. v. Walton*, 30 C. A., 383, 86 Fed., 605; *Coffman v. Castner*, 31 C. C. A., 55, 87 Fed., 457; *Continental Ins. Co. v. Continental Fire Assn.*, 41 C. C. A., 326, 101 Fed., 255; *Wrisley Co. v. Iowa Soap Co.*, 59 C. C. A., 54, 122 Fed., 796. And see *Wotherspoon v. Currie*, 23 L. T. N. S., 443; *Amoskeag Co. v. Garner*, 55 Barb., 151; S. C., 6 Ab. Pr. N. S., 265; *Lea & Perrins v. Deakin*, U. S. Cir. Ct. N. D. of Ill., 11 Chicago Legal News, 152. In *Atwater v. Castner*, 32 C. C. A.,

77, 88 Fed., 642, the court refer to a distinction between cases where plaintiff goes into an unnamed district and himself adopts a name which ultimately comes to be applied to that district and the case where he goes to a place which already has a well known name and attempts to adopt that name. They fail to say, however, into which class the case falls. Their decision is placed upon the ground of long public acquiescence in plaintiff's use of the name "Pocohantas." In a note to the opinion, they say that the case of *Pillsbury Mills Co. v. Eagle*, 30 C. C. A., 386, 86 Fed., 608, fully sustains them. There is, however, the vital difference that in this case defendant was truthfully using the name in question, while in that case the use was fraudulent and untruthful.

<sup>22</sup> *Morgan Envelope Co. v. Walton*, 30 C. C. A., 383, 86 Fed., 605, "Columbia"; *Continental Ins. Co. v. Continental Fire Assn.*, 41 C. C. A., 326, 101 Fed., 255, "Continental"; *Wrisley Co. v. Iowa Soap Co.*, 59 C. C. A., 54, 122 Fed., 796, "Old Country."



ufactured article can not be appropriated as a trade mark, it is held that where a particular kind of table sauce, originally manufactured at Worcestershire and known by that name, has long been known in the market, so that the term "Worcestershire" has become a generic term for that species of sauce, plaintiffs, who reside in Worcestershire and manufacture the sauce there, can not enjoin the sale by defendant of a sauce under the same name, but manufactured by him elsewhere, when plaintiffs have knowingly acquiesced in such manufacture for many years. And when, in such case, plaintiffs have filed their bill against the principal in England, to restrain him from such manufacture and sale there, and have been denied an injunction in such action at the hearing upon the merits, such proceedings will constitute a bar to a subsequent action for an injunction brought by the same plaintiffs against the agent in this country of the defendant in the English suit.<sup>23</sup>

§ 1065 *a*. **When relief granted though words geographical or descriptive; unfair competition.** The principles announced in the preceding sections which deny relief by injunction against the use of words which are generic or geographical or purely descriptive are applicable only to cases where the plaintiff is seeking to establish a technical trade mark in the word or name in question and the consequent right to the use of such word or name to the exclusion of all others; and they have no application where the plaintiff predicates his right to relief, not upon the basis of a trade mark in the particular words or phrases nor upon the assertion of an exclusive right to their use, but upon the fraudulent conduct of the defendant who is employing such names for the evident purpose of obtaining the benefits of the good-will of plaintiff's business. And it may be stated as a general rule of even more

<sup>23</sup> *Lea & Perrins v. Deakin*, U. S. Illinois, 11 Chicago Legal News, Circuit Court, Northern District of 152.

frequent application than those referred to that where a descriptive word or geographical name has, from long usage, acquired a secondary signification as referring to the particular goods sold or manufactured by the plaintiff, and where the defendant is making use of such words, names or phrases with the evident design of inducing the belief that the goods sold by him are in reality those of the plaintiff, or in such a manner as to mislead purchasers into believing that they are buying plaintiff's goods, thereby fraudulently appropriating to himself the advantage of the good-will and reputation of plaintiff's business, relief by injunction will be granted against such a use of the words or names in question notwithstanding the fact that they may be geographical,<sup>24</sup> or purely descriptive,<sup>25</sup> and, as such, not capable of exclusive appropriation and ownership as trade marks. And the rule as regards geographical names applies with especial force where, as additional evidence of defendant's fraudulent design of appropriating the good-will of plaintiff's business, it

<sup>24</sup> *American Waltham Watch Co. v. U. S. W. Co.*, 173 Mass., 85, 53 N. E., 141, 43 L. R. A., 826, 73 Am. St. Rep., 263; *Viano v. Baccigalupo*, 183 Mass., 160, 67 N. E., 641; *Cady v. Schultz*, 19 R. I., 193, 32 Atl., 915, 29 L. R. A., 524, 61 Am. St. Rep., 763; *Rickard v. Caton C. Co.*, 88 Minn., 242, 92 N. W., 958; *Morgan Envelope Co. v. Walton*, 30 C. C. A., 383, 86 Fed., 605; *Shaver v. Heller & M. Co.*, 48 C. C. A., 48, 108 Fed., 821; *Wheeler v. Johnston*, 3 L. R. Ir., 284; *Montgomery v. Thompson*, App. Cas. (1891), 217; *Birmingham Vinegar B. Co. v. Powell*, App. Cas. (1897), 710; *Anheuser-Busch Brewing Assn. v. Piza*, 24 Fed., 149; *Southern W. L. Co. v. Cary*, 25 Fed., 125; *American Waltham Watch Co. v.*

*Sandman*, 96 Fed., 330; *Newman v. Alvord*, 49 Barb., 588; *Hirst v. Denham*, L. R. 14 Eq., 542.

<sup>25</sup> *Reddaway v. Banham*, App. Cas. (1896), 199; *International Committee of Y. W. C. A. v. Y. W. C. A.*, 194 Ill., 194, 62 N. E., 551, 56 L. R. A., 888; *Fuller v. Huff*, 43 C. C. A., 453, 104 Fed., 141, 51 L. R. A., 332; *Shaver v. Heller & M. Co.*, 48 C. C. A., 48, 108 Fed., 821. And in *Buck's Stove Co. v. Kiechle*, 76 Fed., 758, it was held that where plaintiffs were manufacturing and selling stoves and ranges and, as a distinguishing mark for such articles, were lining the inside of the doors with white enamel, as the result of which the stoves had come to be known as "White Enamel" stoves,

appears that he is not manufacturing his goods or doing business in the town or place in question and where his use of the name has therefore not even the merit of truth to sustain it.<sup>26</sup>

§ 1065 *b*. **The same; when injunction denied.** As illustrating the rule, it is held that where defendants use not only the name of the place of plaintiff's business, but also words indicating that they are proprietors of that business, the use of such words being calculated to deceive the public and purchasers and to enable defendants to sell their goods as those of plaintiffs, an injunction may be allowed.<sup>27</sup> So where plaintiff's article has become well known in the trade as the product of a particular place and is designated by that name, and when plaintiffs have the exclusive right of importing the article from the place of its origin under that name, it is held that they have a trade mark in the name, and may enjoin defendant from selling a spurious article under the same name.<sup>28</sup> Where plaintiff's goods have long been popularly known by the name of the place of their manufacture, which name is afterward changed, and defendant then adopts the old name with the evident design of representing his goods as those of plaintiff, an injunction will lie to restrain such

the use by defendants of a lining of white enamel upon similar articles manufactured and sold by them should be enjoined.

<sup>26</sup> *French Republic v. Saratoga* V. S. Co., 191 U. S., 427, 24 Sup. Ct. Rep., 145, affirming S. C., 46 C. C. A., 418, 107 Fed., 459; *El Modello C. M. Co. v. Gato*, 25 Fla., 886, 7 So., 23, 6 L. R. A., 823, 23 Am. St. Rep., 537; *City of Carlsbad v. Kutnow*, 18 C. C. A., 24, 71 Fed., 167; *Genesee Salt Co. v. Burnap*, 20 C. C. A., 27, 73 Fed., 818; *Pillsbury Mills Co. v. Eagle*, 30 C. C. A., 386, 86 Fed., 608, 41

L. R. A., 162; *Pike M. Co. v. Cleveland S. Co.*, 35 Fed., 896; *Southern White Lead Co. v. Coit*, 39 Fed., 492; *City of Carlsbad v. Thackeray & Co.*, 57 Fed., 18; *Gage-Downs Co. v. Featherstone Corset Co.*, 83 Fed., 213; *Collinsplatt v. Finlayson*, 88 Fed., 693; *California Fruit Cannery Assn. v. Myer*, 104 Fed., 82; *Lea v. Wolff*, 1 Thomp. & C., 626.

<sup>27</sup> *Braham v. Beachim*, 7 Ch. D., 848.

<sup>28</sup> *Radde v. Norman*, L. R., 14 Eq., 348.

use of the name.<sup>29</sup> It has been held, however, that where plaintiff is one of a large number of persons all doing business in the same locality and placing an article upon the market to which has been applied the name of that locality by which it has come to be known to the public, he can not enjoin a person doing business in a different place from making a false use of such geographical name in connection with the same article as produced and sold by such other; this being by close analogy to the rule that an individual who suffers no special damage different in kind from that sustained by the public generally can not maintain a bill to enjoin and abate a public nuisance.<sup>30</sup>

§ 1065 *c.* **Form of the writ.** As regards the form of the injunction in cases of the unfair use of geographical names and the extent to which the relief is granted, an examination of the authorities shows that it is generally regarded as a sufficient protection for the rights of the plaintiff if the writ restrains, not the absolute use of the word or name in question, but merely its use in such a manner as to mislead the public, or its use without clear distinguishing words.<sup>31</sup> Bearing in mind, however, the fundamental principle which underlies and controls all cases of this character, which is simply that no man can have the right to represent his goods as those of another person,<sup>32</sup> there can be no doubt that if,

<sup>29</sup> *Seigert v. Findlater*, 7 Ch. D., 801.

<sup>30</sup> *New York & Rosendale Cement Co. v. Coplay Cement Co.*, 44 Fed., 277, 10 L. R. A., 833.

<sup>31</sup> *French Republic v. Saratoga V. S. Co.*, 191 U. S., 427, 24 Sup. Ct. Rep., 145, affirming S. C., 46 C. C. A., 418, 107 Fed., 459; *American Waltham Watch Co. v. U. S. W. Co.*, 173 Mass., 85, 53 N. E., 141, 43 L. R. A., 826, 73 Am. St. Rep., 263; *Reddaway v. Banham*,

App. Cas. (1896), 199; *Birmingham Vinegar B. Co. v. Powell*,

App. Cas. (1897), 710; *City of Carlsbad v. Kutnow*, 18 C. C. A., 24, 71 Fed., 167; *Genesee Salt Co. v. Burnap*, 20 C. C. A., 27, 73 Fed., 818; *Southern White Lead Co. v. Coit*, 39 Fed., 492; *American Waltham Watch Co. v. Sandman*, 96 Fed., 330.

<sup>32</sup> *Reddaway v. Banham*, App. Cas. (1896), 199; *Birmingham Vinegar B. Co. v. Powell*, App.

owing to the widespread nature of the secondary signification which the name has acquired as referring to plaintiff's goods, it would be impossible for the defendant to use that name in any manner without deceiving the public, an injunction may be granted not merely restraining the use of the name without proper words of differentiation but absolutely prohibiting its use in any manner whatsoever.<sup>33</sup>

§ 1065 *d.* **Distinction between cases of trade mark and unfair competition.** It will thus be seen that a clear distinction exists between cases involving the infringement of a technical trade mark and those in which an injunction is sought against what has come to be commonly known as unfair or unlawful competition in trade.<sup>34</sup> While the tendency of the earlier au-

Cas. (1897), 710; *Wrisley Co. v. Iowa Soap Co.*, 59 C. C. A., 54, 122 Fed., 796; *Shaver v. Heller & M. Co.*, 48 C. C. A., 48, 108 Fed., 821.

<sup>33</sup> *Montgomery v. Thompson*, App. Cas. (1891), 217; *Shaver v. Heller & M. Co.*, 48 C. C. A., 48, 108 Fed., 821. In *Montgomery v. Thompson*, Lord Macnaghten says: "It is obvious, I think, that if the injunction had been in that form, (allowing the use of the name with words of differentiation) the appellant could not have used the term 'Stone Ales' at all. It would have been impossible for him to have called his ales 'Stone Ales,' and to have distinguished his ales from those of the plaintiff. Any attempt to distinguish the two, even if honestly meant, would have been perfectly idle. Thirsty folk want beer, not explanations." And see *Pillsbury Mills Co. v. Eagle*, 30 C. C. A., 386, 86 Fed., 608, 41 L. R. A., 162; *Collinsplatt v. Finlayson*, 88 Fed.,

693; *California Fruit Canners Assn. v. Myer*, 104 Fed., 82; in all of which the injunctions seem to have been in the absolute form.

<sup>34</sup> For a clear statement of the distinction, see *Jameson v. Dublin Distillers Co.*, (1900) 1 L. R. Ir., 43; *Cady v. Schultz*, 19 R. I., 193, 32 Atl., 915, 29 L. R. A., 524, 61 Am. St. Rep., 763; *Drake Medicine Co. v. Glessner*, 68 Ohio St., 337, 67 N. E., 722; *Shaver v. Heller & M. Co.*, 48 C. C. A., 48, 108 Fed., 821. In *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed., 651, Bradford, J., uses the following language at page 659: "The second of the two principal questions in the case is whether the bill and exhibits show unfair competition in trade by the defendant so far as the complainant is concerned. The gradual but progressive judicial development of the doctrine of unfair competition in trade has shed lustre on that branch of our jurisprudence as an

thorities was to confuse the two classes of cases and to bring them under the same general designation of trade mark cases, the result of the later decisions is to narrow the term trade mark to such symbols as strictly designate the origin or ownership of an article and to exclude such words as are generic or geographical, or descriptive of the nature or quality of an article. The distinction is not strictly logical since an inten-

embodiment, to a marked degree, of the principles of high business morality, involving the nicest discrimination between those things which may, and those which may not, be done in the course of honorable rivalry in business. This doctrine rests on the broad proposition that equity will not permit any one to palm off his goods on the public as those of another. The law of trade-marks is only one branch of the doctrine. But while the law of trade-marks is but part of the law of unfair competition in trade, yet when the two are viewed in contradistinction to each other an essential difference is to be observed. The infringement of trade-marks is the violation by one person of an exclusive right of another person to the use of a word, mark or symbol. Unfair competition in trade, as distinguished from infringement of trade-marks, does not involve the violation of any exclusive right to the use of a word, mark or symbol. The word may be purely generic or descriptive, and the mark or symbol indicative only of style, size, shape, or quality, and as such open to public use "like the adjectives of the language," yet there may be unfair

competition in trade by an improper use of such word, mark or symbol. Two rivals in business competing with each other in the same line of goods may have an equal right to use the same words, marks or symbols on similar articles produced or sold by them respectively, yet if such words, marks, or symbols were used by one of them before the other and by association have come to indicate to the public that the goods to which they are applied are of the production of the former, the latter will not be permitted, with intent to mislead the public, to use such words, marks, or symbols in such a manner, by trade dress or otherwise, as to deceive or be capable of deceiving the public as to the origin, manufacture or ownership of the articles to which they are applied; and the latter may be required, when using such words, marks, or symbols, to place on articles of his own production or the packages in which they are usually sold something clearly denoting the origin, manufacture or ownership of such articles, or negating any idea that they were produced or sold by the former."

tional infringement of a trade mark proper involves the very same elements of unfairness and fraud as are present in cases of unfair competition. In some respects, however, the distinction is of considerable importance. For example, in cases of a technical trade mark, the plaintiff, having established his right to the exclusive use of a word or symbol as a trade mark, will ordinarily be entitled to relief merely upon showing an unauthorized use thereof by the defendant; while in cases of unfair competition, the aggrieved party must show not only an unauthorized use of the word or name in question but its use in such a manner and under such circumstances as will result in the likelihood of misleading and deceiving purchasers.<sup>35</sup> And the distinction is of especial importance as affecting the jurisdiction of the United States courts, since, in the case of technical, registrable trade marks, when used in foreign commerce or in commerce with the Indian tribes, the jurisdiction of these courts to grant injunctions exists by virtue of the provisions of the acts of March 3, 1881,<sup>36</sup> and of February 20, 1905, and is not dependent upon the diverse citizenship of the parties nor upon the amount in controversy; while, in the case of unlawful competition, federal jurisdiction must be based, if at all, upon diverse citizenship, since the acts in question have reference only to words and symbols which are capable of exclusive ownership and consequent registration.<sup>37</sup> It is to be observed, however, that the resemblances between the two classes of cases are more numerous than their differences, and it is believed that the distinction, while clearly marked out by the more recent authorities and while of importance in the respects above mentioned, is of no

<sup>35</sup> *Elgin National Watch Co. v. Soap Co.*, 59 C. C. A., 54, 122 Fed. Illinois Watch Co., 179 U. S., 665, 796.

21 Sup. Ct. Rep., 270, affirming S. C., 35 C. C. A., 237, 94 Fed., 667, which reversed S. C., 89 Fed., 487; <sup>36</sup> 21 Stat., 502; 3 U. S. Comp. Stat. 1901, p. 3401.

*Reddaway v. Banham*, App. Cas. Illinois Watch Co., 179 U. S., 665, (1896), 199; *Wrisley Co. v. Iowa* 21 Sup. Ct. Rep., 270, affirming S.

great practical value so far as the question of general equitable relief is concerned since precisely the same principles of equity govern the granting of injunctions in the one class of cases as in the other.<sup>38</sup>

§ 1066. **Street name and number; name of store; name of residence.** Upon principles analogous to those which govern in cases of trade marks, the good-will in the name of a place as designating a particular manufacture may be protected in equity. Hence one who has established and built up a profitable business at a particular place, and who has attached to the business a name indicating to the public the place where such business is conducted, acquires such a property in that name as a part of the good-will of his business as to entitle him to restrain its use by another. Thus, the use of the words, "Number 10, South Water Street," as indicating the place of business of a manufacturer, has been protected by injunction, the words being a mere arbitrary designation, and not corresponding with any actual number.<sup>39</sup> And where the plaintiff, who was engaged in the clothing business, had applied to his store the fanciful name "Mechanics' Store" by which it had come to be known to the public, the right to the use of such name constitutes a part of the good-will of the business, and an injunction was accordingly granted restraining defendant, who was engaged in the same line of business next door to plaintiff, from applying the name "Mechanical Store" to his place of business.<sup>40</sup> It is held, however, that there can not be such an exclusive appropriation of a particu-

C., 35 C. C. A., 237, 94 Fed., 667, which reversed S. C., 89 Fed., 487. Section 5 of the Act of February 20, 1905, expressly provides that descriptive words and geographical names shall not be registered. See, *ante*, p. 1020, note 6.

<sup>38</sup> See the able and exhaustive opinion of Neil, Sp. J., in *Sim-*

*mons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn., 84, 23 S. W., 165.

<sup>39</sup> *Glen & Hall M. Co. v. Hall*, 61 N. Y., 226, reversing S. C., 6 Lans., 158. And see *Boulnois v. Peake*, 13 Ch. D., 513, note.

<sup>40</sup> *Weinstock v. Marks*, 109 Cal.,



lar name as applied to one's residence or premises as to warrant relief by injunction against the use of such name by another.<sup>41</sup> An action for an injunction can not, therefore, be maintained to restrain defendant from calling his house by the name of plaintiff's residence, in the absence of any improper or malicious intention upon the part of defendant.<sup>42</sup>

§ 1067. **Unmeaning symbol; different class of goods; colorable differences.** However unmeaning or absurd the mark or symbol used may be in itself, it may still be the subject of a trade mark and entitled to protection.<sup>43</sup> It is to be observed, however, that the right is limited to the use of the symbol with reference to a particular line of goods, so that its use in connection with a different class of goods is not deemed a piracy.<sup>44</sup> But since the imitation of a trade mark with partial differences, such as would not be observed by the public, effects the same injury as an entire counterfeit, it follows that any imitation, with only a colorable difference in some of the details, will be restrained.<sup>45</sup> Thus, where de-

529, 42 Pac., 192, 30 L. R. A., 132, 50 Am. St. Rep., 57.

<sup>41</sup> Day v. Brownrigg, 10 Ch. D., 294; Street v. Union Bank, 30 Ch. D., 156.

<sup>42</sup> Day v. Brownrigg, 10 Ch. D., 294.

<sup>43</sup> Perry v. Truefitt, 6 Beav., 66; Braham v. Bustard, 1 Hem. & M., 477.

<sup>44</sup> Leather Cloth Co. v. American Leather Cloth Co., 33 L. J. Ch., 199; Hall v. Barrows, Ib., 204; Braham v. Bustard, 1 Hem. & M., 447; Celluloid Mfg. Co. v. Read, 47 Fed., 712.

<sup>45</sup> Clark v. Clark, 25 Barb., 76; Brooklyn White Lead Co. v. Masury, Ib., 416; Williams v. Spence, 25 How. Pr., 366; Kosterling v.

Seattle B. & M. Co., 54 C. C. A., 76, 116 Fed., 620; Liggett & Myers Tobacco Co. v. Reid T. Co., 104 Mo., 53, 15 S. W., 843; National Biscuit Co. v. Swick, 121 Fed., 1007; Collinsplatt v. Finlayson, 88 Fed., 693. And see Gillott v. Esterbrook, 47 Barb., 455. In Brooklyn White Lead Co. v. Masury, 25 Barb., 416, the plaintiff, an incorporated company, had been engaged for over twenty years in manufacturing white lead in the city of Brooklyn, and was accustomed to mark its kegs "Brooklyn White Lead Company," or "Co." Defendant was engaged in the same business, and at the same place, though established for a less period of time, and the imitation complained of was in

fendant's trade mark is in all respects similar to that of complainant, except only in the use of the name, the injunction will be allowed.<sup>46</sup>

marking his kegs "Brooklyn White Lead and Zinc Company." The injunction was sustained on appeal to the Supreme Court, Mitchell, P. J., saying: "It is to protect the plaintiff's right of selling his own that the law of trade marks has been introduced. It must include a right to sell to all—to the incautious as well as to the cautious. Any false name that is assumed in imitation of a prior true name is in violation of this right, and the use of it should be restrained by injunction." The injunction was, however, modified so as to prevent the use of the word "Company," or "Co.," allowing the use of the remaining words.

<sup>46</sup> *Gillott v. Esterbrook*, 47 Barb., 455; *Hostetter v. Vowinkle*, 1 Dill., 329. In this case an injunction was allowed to restrain an imitation of complainant's label, resembling the original in all respects, except that the word "Hostetter" was changed to "Holstetter" and the words "Hostetter & Smith" were changed to "Holstetter & Smyth." The principles applicable to the infringement of trade marks are well laid down in this case by Dillon, J., as follows: "The law is well settled that a party who has appropriated a particular trade mark to distinguish his goods from other similar goods has a right or property in it which entitles him to its ex-

clusive use. This right is of such a nature that equity will protect it, by injunction, from invasion, and if it has been invaded the wrong-doer is liable for the damage he has thereby caused the party whose trade mark he has adopted or illegally imitated; which damage will ordinarily be the loss of profits caused by the illegal or fraudulent infringement. *Candee et al. v. Deere et al.*, 54 Ill., 439; S. C., 10 Am. Law Reg. (N. S.), 694; *Motley v. Downman*, 3 Myl. & Cr., 1; *Millington v. Fox*, Ib., 338; *Eden on Injunc.*, ch. 14, p. 314; *Story Eq. Jurisp.*, § 951; *Taylor v. Carpenter*, 2 Woodb. & M., 1; *Walton v. Crowley*, 3 Blatch., 440; *Coffeen v. Brunton*, 4 McLean, 518; *Seixo v. Provezende*, 1 Ch. Ap., 194; *Amoskeag Manuf'g Co. v. Spear*, 2 Sandf. S. C. R., 606; *Filley v. Fassett*, 8 Am. Law Reg. (N. S.), 402, 44 Mo., 168, and cases cited; *Gillott v. Esterbrook*, 47 Barb., 469; *Burnett v. Phalon*, 9 Bosw., 192; *Croft v. Day*, 7 Beav., 89; *Edleston v. Vick*, 23 Eng. C. L. & Eq., 53. These cases and others also show that it is not necessary to constitute an illegal infringement that the trade mark of the originator should be copied in every particular. It is sufficient to warrant equitable relief that it is likely to deceive or mislead the patrons of the originator, or make it pass with the public as his."

§ 1068. **Manufacturer protected; system of numbers; letters; general principles.** It may be laid down as a general rule that a manufacturer, adopting a certain trade mark and stamping it upon his goods, acquires the exclusive right to the use of that particular mark or symbol in connection with that particular class of goods, and that he is entitled to the interposition of a court of equity to enforce this right by perpetual injunction.<sup>47</sup> Even a system of numbers, if adopted and used for the purpose of designating the manufacturer's particular goods, comes within the rule and is entitled to protection.<sup>48</sup> So the use by a manufacturer of an arbitrary combination of figures, such as "830," to designate a particular class of goods may be protected by injunction.<sup>49</sup> So the adoption and use by plaintiff of a code or system represented by letters, figures and characters, showing the cost and selling price of merchandise and used in such of plaintiff's business catalogues as are intended for use by its traveling salesmen will be protected by injunction.<sup>50</sup> But letters and numbers, or a combination of letters and numbers, used for the purpose of designating the size, shape and quality of a manufacturer's goods, do not constitute a trade mark and are not entitled to protection in equity.<sup>51</sup> So an arbitrary combination of letters and numerals used for the sole purpose of designating the different interchangeable parts of a complicated piece of machinery without any intention of designating origin or ownership is not subject to protection by in-

<sup>47</sup> *Taylor v. Carpenter*, 11 Paige, 755. And see this case as 292, affirmed by the court for the correction of errors; *Hostetter v. Vowinkle*, 1 Dill., 329.

<sup>48</sup> *Ainsworth v. Walmsley*, 1 L. R. Eq., 518.

<sup>49</sup> *Shaw S. Co. v. Mack*, 21 Blatch., 1; S. C., 12 Fed., 707.

<sup>50</sup> *Simmons Hardware Co. v. Waibel*, 1 S. Dak., 488, 47 N. W., 814, 11 L. R. A., 267, 36 Am. St.

Rep., 755. And see this case as to the right to a receiver to take possession of the infringing publication.

<sup>51</sup> *Manufacturing Co. v. Trainer*, 101 U. S., 51; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S., 537, 11 Sup. Ct. Rep., 396; *Candee v. Deere*, 54 Ill., 439; S. C., 10 Am. Law Reg. N. S., 694.

junction as a trade mark.<sup>52</sup> The jurisdiction rests upon fraud on the part of the defendant,<sup>53</sup> and upon the principle that equity will not allow one to sell his own goods under the pretense that they are the goods of another.<sup>54</sup> And in addition to such a general resemblance of forms, words and symbols as to mislead the public, there must be, to constitute a piracy, such a distinctive individuality as to procure for the person the benefit of the deception which such general resemblance will produce.<sup>55</sup> It is wholly immaterial whether the simulated article is or is not inferior to or of equal quality with the genuine.<sup>56</sup> But the injunction will not be granted where its effect would be to restrain the sale of a genuine article and aid in the sale of a simulated one.<sup>57</sup> Nor will equity interfere where defendant has acted under such acquiescence on the part of complainants as is equivalent to a license.<sup>58</sup>

<sup>52</sup> *Deering Harvester Co. v. Whitman & Barnes Mfg. Co.*, 33 C. C. A., 558, 91 Fed., 376.

<sup>53</sup> *Delaware & H. Canal Co. v. Clark*, 7 Blatch., 112.

<sup>54</sup> *Perry v. Truefitt*, 6 Beav., 66. Lord Langdale, Master of the Rolls, observes: "I think that the principle on which both the courts of law and equity proceed, in granting relief and protection in cases of this sort, is very well understood. A man is not to sell his own goods under the pretense that they are the goods of another man; he can not be permitted to practice such a deception, nor to use the means which contribute to that end. He can not, therefore, be allowed to use names, marks, letters or *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can ac-

quire a property merely in a name or mark; but whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purpose of deception, and in order to attract to himself that course of trade or that custom which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark."

<sup>55</sup> *Croft v. Day*, 7 Beav., 84; *Col-laday v. Baird*, 7 Upper Canada Law Journal, 132.

<sup>56</sup> *Taylor v. Carpenter*, 11 Paige, 292; *Coats v. Holbrook*, 2 Sandf. Ch. R., 586. And see, *post*, § 1091 *a*.

<sup>57</sup> *Samuel v. Berger*, 24 Barb., 163; S. C., 4 Ab. Pr., 88; S. C. *sub. nom.* *Samuel v. Buger*, 13 How. Pr., 342.

<sup>58</sup> *Delaware & H. Canal Co. v. Clark*, 7 Blatch., 112.

§ 1069. **Use of one's own name not enjoined.** It may be stated as a general rule that, in the absence of fraud or deceit, plaintiff and defendant both having the same surname, equity will not enjoin defendant from using his name in the pursuit of his lawful business, even though such use by defendant results in injury to plaintiff; since there can not, under such circumstances, be a trade mark in the surname which will prevent defendant from its use.<sup>59</sup> So one may use his own name in describing a manufactured article, or may permit a company incorporated for the manufacture of the article to use that name, and such company will not be enjoined if the name is used in connection with the article in such manner as not to lead the public to believe that they are buying the article manufactured by plaintiff under the same name, no fraud or deceit being shown.<sup>60</sup>

§ 1070. **The same; when injunction granted; idem sonans; one's name as part of corporate name; when fraudulent intent unnecessary.** While, as thus shown, no person can acquire the exclusive right to the use of his own name as against other persons of the same name, yet where the defendant is using his own name, not honestly or legitimately, but with the evident design and consequent result of inducing the mistaken belief that his business is that of the plaintiff, thereby passing his goods off as those of the plaintiff and acquiring the benefit of the good-will and reputation of the latter's business, relief by injunction is freely granted against such an improper and fraudulent use of one's own name. The protection afforded by courts of equity in such cases is not dependent upon any exclusive right to the particular

<sup>59</sup> *Brown Chemical Co. v. Meyer*, 271; *Meneely v. Meneely*, 1 Hun, 139 U. S., 540, 11 Sup. Ct. Rep., 367. See also *Olin v. Bate*, 98 Ill., 625, affirming S. C., 31 Fed., 453; 53, as to enjoining the use of a *Turton & Sons v. Turton & Sons*, 58 fictitious name.

*L. J. N. S. Ch.*, 677; *Harson v.* <sup>60</sup> *Massam v. Thorley's Cattle Halkyard*, 22 R. L., 102, 46 Atl., *Food Co.*, 6 Ch. D., 574.

name or to the name in connection with a particular form of words. The right to relief is rather dependent upon the necessity of extending protection against the commission of fraud, and this fraud may consist in the use of a name to which defendant is entitled, if such use be coupled with other circumstances rendering it an infringement of plaintiff's rights.<sup>61</sup> Thus, one will not be allowed to use his family

<sup>61</sup> *Croft v. Day*, 7 Beav., 84; *Fullwood v. Fullwood*, 9 Ch. D., 176; *Jameson v. Dublin Distillers Co.*, (1900), 1 L. R. Ir., 43; *Allegretti v. Allegretti Chocolate Cream Co.*, 177 Ill., 129, 52 N. E., 487; *Robinson v. Storm*, 103 Tenn., 40, 52 S. W., 880; *El Modello C. M. Co. v. Gato*, 25 Fla., 886, 7 So., 23, 6 L. R. A., 823, 23 Am. St. Rep., 537; *Tarrant & Co. v. Hoff*, 22 C. C. A., 644, 76 Fed., 959, 33 L. R. A., 250; *Baker & Co. v. Sanders*, 26 C. C. A., 220, 80 Fed., 889; *Stuart v. Stewart & Co.*, 33 C. C. A., 480, 91 Fed., 243; *Chickering v. Chickering*, 56 C. C. A., 475, 120 Fed., 69; *Royal Baking Powder Co. v. Royal*, 58 C. C. A., 499, 122 Fed., 337. See also *James v. James*, L. R. 13 Eq., 421; *Landreth v. Landreth*, 22 Fed., 41. *Croft v. Day*, 7 Beav., 84, was a bill for an injunction under the following circumstances: An establishment for the manufactory of blacking had for many years been carried on under the name of Day & Martin, at 97 High Holborn, London. Upon the death of Day and Martin, the business was conducted by Day's executors in the same name. A nephew of the deceased Day applied to another person named Martin for permission to use his name in the manufacture and sale of blacking, and permission was granted. Day then commenced the manufacture of blacking at 90½ Holborn Hill, and sold his blacking under the name of Day & Martin, using similar bottles and almost identical labels with those used by the original Day & Martin, the labels being of exactly the same size and color and with the letters arranged in precisely the same manner. The injunction was allowed, Lord Langdale, Master of the Rolls, saying: "The accusation which is made against this defendant is this: that he is selling goods under forms and symbols of such a nature and character as will induce the public to believe that he is selling the goods which are manufactured at the manufactory which belonged to the testator in this cause. It has been very correctly said that the principle, in these cases, is this: that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols to which he has no peculiar

name in connection with his article of manufacture, with such slight changes as to mislead the public and to secure a trade intended for and supposed by purchasers to be given to the

or exclusive right, and thereby personate another person for the purpose of inducing the public to suppose either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest, that to do these things is to commit a fraud, and a very gross fraud. I stated, upon a former occasion, that, in my opinion, the right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and fraud may be practiced against him by means of a name, though the person practicing it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others. It is perfectly manifest that two things are required for the accomplishment of a fraud such as is here contemplated. First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public. And, secondly, a sufficient distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which the general resemblance is calculated to pro-

duce. To have a copy of the thing would not do, for, though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which is improperly sought to be sold. For the accomplishment of such a fraud it is necessary in the first instance to mislead the public, and in the next place to secure a benefit to the party practicing the deception by preserving his own individuality. There are many distinctions, even more than have been stated, between these two labels. It is truly said, that if any one takes upon himself to study these two labels he will find several marks of distinction. On the other hand, the colors are of the same nature, the labels are exactly of the same size, the letters are arranged precisely in the same mode, and the very same name appears on the face of the jars or bottles in which the blacking is put. It appears, therefore, to me that there is quite sufficient to mislead the ordinary run of persons, and that the object of the defendant is to persuade the public that this new establishment is, in some way or other, connected with the old firm or manufacturer, and at the same time to get purchasers to go to 90½ Holborn Hill, and not to 97 High Holborn. I think what has been done here is quite calcu-

original person of that name.<sup>62</sup> So where the name of a partner has been used as a trade mark to designate the goods manufactured by the firm, and such partner sells his interest in the business and trade mark, he may be enjoined from afterward using his name to designate similar goods manufactured by himself.<sup>63</sup> And where the surname of plaintiffs and of defendant was the same, and defendant had been enjoined from using the firm name of the plaintiffs in such manner as to mislead the public, or to induce them to believe that he was the plaintiffs, and thereupon the defendant made a merely colorable change in the arrangement of the name, which was still calculated to deceive the public, he was held guilty of a contempt in violating the injunction.<sup>64</sup> And it is no de-

lated to effect that purpose, and the defendant must be restrained. My decision does not depend on any peculiar or exclusive right the plaintiffs have to use the names Day and Martin, but upon the fact of the defendant using those names in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain, at the expense of Day's estate, a benefit for himself, to which he is not, in fair and honest dealing, entitled. Such being my opinion, I must grant the injunction restraining the defendant from carrying on that deception. He has the right to carry on the business of a blacking manufacturer honestly and fairly; he has a right to the use of his own name; I will not do anything to debar him from the use of that or any other name calculated to benefit himself in an honest way; but I must prevent him from

using it in such a way as to deceive and defraud the public, and obtain for himself at the expense of the plaintiffs, an undue and improper advantage."

<sup>62</sup> *Gouraud v. Trust*, 6 Thomp. & C., 133. In this case defendants were plaintiff's sons, but having a different surname, and plaintiff had been for many years engaged in manufacturing and selling a cosmetic designated and labeled as "T. Felix Gouraud's Oriental Cream and Magical Beautifier." Defendants began the manufacture of a cosmetic which they designated and labeled "Creme Orientale, by Dr. T. F. Gouraud's Sons," and an injunction was allowed.

<sup>63</sup> *Russia Cement Co. v. Le Page*, 147 Mass., 206, 17 N. E., 304.

<sup>64</sup> *Devlin v. Devlin*, 69 N. Y., 212, affirming S. C., 67 Barb., 290, 4 Hun, 651. But Church, C. J., in delivering the opinion, observes that the case "sails very close to



fense that the names in question are spelled differently if they are *idem sonans*, the proper test being identity of sound and not of appearance.<sup>65</sup> And relief may be granted against the fraudulent use of one's name as part of a corporate name. Thus, where the name of a member of a corporation is adopted as part of the corporate name for the purpose and with the result of acquiring the benefit of plaintiff's business, such use of the name will be enjoined.<sup>66</sup> So where an officer of a corporation which has the right to use his name as part of its corporate name withdraws from the concern and afterwards organizes another corporation, adopting for it a name of which his own forms a part, thereby causing confusion and a diversion of the plaintiff's business, the old corporation may enjoin the new one from the use of such corporate name.<sup>67</sup> But where two persons of the same name manufacture the same article, calling it by their names, the later manufacturer

the wind," and costs were denied to either party as against the other in the Court of Appeals.

<sup>65</sup> *Stuart v. Stewart & Co.*, 33 C. C. A., 480, 91 Fed., 243. In this case plaintiff was selling an article known as "Stuart's Dyspepsia Tablets". Defendant, named Stewart, was enjoined from selling the same article put up in boxes of the same size and shape and labeled "Dr. Stewart's Dyspepsia Tablets."

<sup>66</sup> *Rogers Co. v. Wm. Rogers Mfg. Co.*, 17 C. C. A., 576, 70 Fed., 1017; *Garrett v. Garrett & Co.*, 24 C. C. A., 173, 78 Fed., 472. In the latter case, plaintiffs were doing business under the firm name of W. E. Garrett & Sons and were manufacturing snuff known as "Garrett's Snuff." Defendant was a corporation doing business un-

der the name of T. H. Garrett & Co., and was selling snuff in packages with labels and wrappers almost identical with plaintiff's, except that "T. H. Garrett, Louisville, Ky." was substituted for "W. E. Garrett, Philadelphia." Defendant's capital stock consisted of 350 shares. Its name was taken from the name of one T. H. Garrett who owned only two and one-half shares of the stock and was not an officer of the corporation. Defendant was enjoined from using the name "T. H. Garrett" or "Garrett" as part of its corporate name or in its business.

<sup>67</sup> *Higgins Co. v. Higgins Soap Co.*, 144 N. Y., 462, 39 N. E., 490, 27 L. R. A., 42, 43 Am. St. Rep., 769.

will not be enjoined in the absence of evidence that he has represented his own article as that of the elder manufacturer.<sup>68</sup> Nor will the relief be granted where the defendant is using his name in such a manner that there can be no deception or likelihood of deception.<sup>69</sup> Upon the other hand, if the use of the name is such that it will, in all probability, result in deceiving and misleading the purchasing public, the relief may be granted although there is no fraudulent intent upon the part of the defendant to pirate the goodwill of plaintiff's business.<sup>70</sup>

§ 1070 *a*. **Form of injunction against use of one's own name.** As to the form of the injunction in such cases, it will be observed that the courts decline to enjoin the defendant from the absolute use of his own name but limit the relief merely to prohibiting its use in such a manner as to result in the likelihood of deception or without clear distinguishing words.<sup>71</sup>

<sup>68</sup> *Burgess v. Burgess*, 3 DeGex, M. & G., 896; S. C., 17 Eng. L. & Eq., 257. And see *Holloway v. Holloway*, 13 Beav., 209.

<sup>69</sup> *Duryea v. National Starch-Mfg. Co.*, 25 C. C. A., 139, 79 Fed., 651. And see *Rogers v. Wm. Rogers Mfg. Co.*, 17 C. C. A., 575, 70 Fed., 1019.

<sup>70</sup> *Jameson v. Dublin Distillers Co.*, (1900) 1 L. R. Ir., 43; *Tarrant & Co. v. Hoff*, 22 C. C. A., 644, 76 Fed., 959, 33 L. R. A., 250.

<sup>71</sup> *Rock Spring Distillery Co. v. Monarch*, (Ky.) 22 S. W., 1028; *Jameson v. Dublin Distillers Co.*, (1900) 1 L. R. Ir., 43, in which the defendant was compelled to differentiate by prefixing the name "Jameson's Whiskey" with the name "William" or any other word which would distinguish

their whiskey from plaintiff's; *Allegretti v. Allegretti Chocolate Cream Co.*, 177 Ill., 129, 52 N. E., 487, in which the defendant was enjoined from using the name "Allegretti" "except when such use is coupled with words clearly indicating that such goods were manufactured and are sold" by defendant and not by the plaintiff; *Tarrant & Co. v. Hoff*, 22 C. C. A., 644, 76 Fed., 959, 33 L. R. A., 250, in which the defendant was enjoined from using the name "Hoff's Malt Extract" without prefixing his christian name "Leopold"; *Baker & Co. v. Sanders*, 26 C. C. A., 220, 80 Fed., 889, in which the defendant was enjoined from using the name "Bakers", whether preceded by his initials or not, in such collocation

§ 1071. **Use of letters; fanciful name; illustrations.** The use of certain letters of the alphabet in connection with an article of sale, which letters have no meaning in themselves as applied to the article in question, but are only used to designate it as belonging to plaintiff, when continued for many years so that the article becomes known in the market and identified by those letters, creates such a trade mark as entitles the owner to relief by injunction against its piracy.<sup>72</sup> And the use by plaintiff of a fanciful name, such as "Eureka," applied to his wares, whereby they become generally known and acquire a favorable reputation in the market, will entitle him to protection in equity in the use of such name.<sup>73</sup> So the use of the word "Parabola" printed upon packages of needles manufactured and sold by plaintiffs, under which name their needles have acquired a wide celebrity and an extensive sale, constitutes such a trade mark as to entitle them to enjoin defendant from using the same word upon his packages of needles. And the fact that defendants have also used their firm name as manufacturers in connection with such word, instead of using plaintiffs' name, will not defeat plaintiffs' right to the exclusive use of the word nor debar them from relief by injunction.<sup>74</sup> And when a manufacturer adopts and applies to his product a new name consisting of words in common use, not generic in character nor descriptive of the article or of its quality, but merely fanciful and arbitrary as applied to such article, he is entitled to protection by injunction in the use of such

with the word "Chocolate", whether accompanied by the use of descriptive words or not, in such a way as to indicate that the chocolate sold by him was "Bakers Chocolate"; *Royal Baking Powder Co. v. Royal*, 58 C. C. A., 499, 122 Fed., 337; *El Modello C. M. Co. v. Gato*, 25 Fla., 886, 7 So., 23, 6 L.

R. A., 823, 23 Am. St. Rep., 537.

<sup>72</sup> *Kinahan v. Bolton*, 15 Ir. Ch., 75.

<sup>73</sup> *Ford v. Foster*, L. R., 7 Ch., 611.

<sup>74</sup> *Roberts v. Clark*, U. S. Circuit Court, Northern District of Illinois, 11 Chicago Legal News, 140.

name, even though it has become so generally known as to be adopted by the public as the name of the article in question.<sup>75</sup> So the use of the word "Pride" upon boxes of cigars manufactured and sold by plaintiffs constitutes a trade mark and entitles them to restrain defendants from using the same word to designate their cigars.<sup>76</sup> And the word "Hoosier," as applied to designate a grain drill manufactured and sold by plaintiff, may become a trade mark, and its unauthorized use by another to designate similar articles manufactured by him may be enjoined.<sup>77</sup> So the word "Hygeia" as applied to various waters prepared by plaintiff is subject to exclusive use as a trade mark and the mere fact that it might suggest to some persons the idea of the characteristic or quality of healthfulness does not render it a mere descriptive word against the use of which an injunction should be denied.<sup>78</sup> So the word "Ideal," being non-descriptive and purely arbitrary and fanciful as applied to fountain pens and having no natural or necessary application to such an article, is entitled to protection as a trade mark and its unauthorized use by defendant in connection with the same article will be enjoined.<sup>79</sup> So the use of the word "Marvel" as applied to flour manufactured by plaintiff, which by use and reputation has come to denote the source and ownership of the article, constitutes a valid trade mark and its piracy will accordingly be restrained.<sup>80</sup> So the words "Cream" and "Royal" as applied to baking powder, are held to be not merely descriptive but as indicating the origin and ownership of that article and their unauthorized

<sup>75</sup> *Selchow v. Baker*, 93 N. Y., 59. *v. Hygeia Ice Co.*, 72 Conn., 646,

<sup>76</sup> *Hier v. Abrahams*, 82 N. Y., 45 Atl., 957, 49 L. R. A., 147.

519. <sup>79</sup> *Waterman v. Shipman*, 130 N.

<sup>77</sup> *Julian v. Hoosier D. Co.*, 78 Y., 301, 29 N. E., 111.

Ind., 408. <sup>80</sup> *Listman Mill Co. v. Listman*

<sup>78</sup> *Hygeia D. W. Co. v. Hygeia M. Co.*, 88 Wis., 334, 60 N. W.,  
Ice Co., 70 Conn., 516, 40 Atl., 534. 261, 43 Am. St. Rep., 907.

But see, *contra*, *Hygeia D. W. Co.*

use by defendant will therefore be enjoined.<sup>81</sup> And the name "Cough Cherries" as applied to confections manufactured and sold by plaintiff is sufficiently arbitrary and fanciful to be subject to exclusive use as a trade mark, the article not being cherries and containing none in its manufacture, and the unauthorized use of the words by defendant will be restrained.<sup>82</sup>

§ 1072. **Word from foreign language; "original."** One who has adopted a word from a foreign language to designate his article of manufacture, and who has spent much time and money in building up a business in the sale of the article by that name, acquires such a property in the word as to entitle him to enjoin its use by defendant in his manufacture, even though defendant uses it in connection with other words, when such use by defendant is calculated to deceive the public.<sup>83</sup> Where, however, the foreign words are purely descriptive, a person can not acquire the right to their exclusive use any more than he can to words of our own language, and in the absence of false or fraudulent representations by the defendant, the use of the same or similar foreign words will not be enjoined.<sup>84</sup> But the use of the word "original" as applied to an article of trade by the original inventor, under which name it has been long used and known in the market, will entitle one whose title is

<sup>81</sup> *Price Baking Powder Co. v. applied to his store a Swedish*  
*Fyfe*, 45 Fed., 799; *Raymond v.* name which, when translated,  
*Royal Baking-Powder Co.*, 29 C. meant "Swedish Snuff Store."  
C. A., 245, 85 Fed., 231. Defendant, who was engaged in

<sup>82</sup> *Stoughton v. Woodard*, 39 the same business near plaintiff,  
Fed., 902. had given to his store a Swedish

<sup>83</sup> *Rillet v. Carlier*, 61 Barb., name which, when translated,  
435. meant substantially the same

<sup>84</sup> *Bolander v. Peterson*, 136 Ill., thing. It was held that as the  
215, 26 N. E., 603, 11 L. R. A., 350. words were purely descriptive and  
In this case defendant who was were being used by the defendant  
catering to the Swedish trade was with equal truth, the injunction  
engaged in selling snuff and had should be denied.

derived under such inventor to the aid of an injunction to restrain other persons from applying that designation to their manufacture.<sup>85</sup> And when plaintiffs' article has long been manufactured under a particular name as the original invention of the kind, defendant who afterward manufactures the same article will not be permitted to advertise his own as the only genuine article of that kind, and will not be allowed to represent that plaintiffs' article is spurious.<sup>86</sup>

§ 1073. **Expiration of patent; falsely describing article as patented.** Where plaintiff has manufactured and sold a patented article to which he has applied a name which, by long use, has come to be the generic name by which the article is commonly known to the public, while, during the life of the patent and as an incident thereto, he has the right to the exclusive use of the name, yet that right is co-extensive merely with the duration of the monopoly created by the patent, and accordingly, in the absence of any of the elements of unfair competition, plaintiff can not enjoin another manufacturer from the use of such name as applied to the same article manufactured and sold by him after the expiration of the patent.<sup>87</sup> And where defendants' label which it is sought to enjoin is not calculated to deceive or to mislead the public, and is only a description of an article manufactured by defendants according to an expired patent, they

<sup>85</sup> *Cocks v. Chandler*, L. R. 11 all others, and the injunction was Eq., 446. accordingly denied.

<sup>86</sup> *James v. James*, L. R. 13 Eq., 421. A contrary view, however, has been taken in *Centaur Co. v. Heinsfurter*, 28 C. C. A., 581, 84 Fed., 955, in which the court held that since the defendant was selling his Castoria as the "only genuine" Castoria, there was no attempt to pass it off as plaintiff's article, but rather an attempt to distinguish his own article from

<sup>87</sup> *Holzappel's Composition Co. v. Rahtjen's Composition Co.*, 183 U. S., 1, 22 Sup. Ct. Rep., 6, reversing S. C., 41 C. C. A., 329, 101 Fed., 257, which reversed S. C., 97 Fed., 949; *Centaur Co. v. Heinsfurter*, 28 C. C. A., 581, 84 Fed., 955; *Linoleum Co. v. Nairn*, 7 Ch. D., 834. See also *Filley v. Child*, 16 Blatch., 376.

will not be enjoined; since a patentee under an expired patent will not be permitted to prolong his monopoly by endeavoring to convert a description of the manufactured article into a trade mark.<sup>88</sup> So when a patented machine becomes known to the public by the use of the patentee's name, his successors do not acquire a property right in the use of such name after the expiration of the patents, and can not enjoin other dealers from using the name in connection with their machines.<sup>89</sup> And where plaintiff has manufactured and sold an article to which he has given a name which has come to be generic as referring to that particular article, the fact that he describes it as patented will not give him the exclusive right to the use of that word as a trade mark if in fact no patent exists.<sup>90</sup>

§ 1074. **When injunction granted though patent expired.** The rule denying relief against the use of a name which has become common property by reason of the expiration of the patent upon the article to which it is applied must always be understood as referring to a use which is free from the taint of fraud or misrepresentation; and where the defendant, in employing such name in connection with an article of his own manufacture, is doing so in such a manner as to mislead the public and with the evident intention of passing off his goods as those of the plaintiff, equitable relief is freely granted restraining such fraudulent conduct. In all such cases, as in those involving the use of geographical or descriptive words or of one's own name, the right to the injunction is not based upon the exclusive right to the use of the name in question as a technical trade mark, but rests upon the necessity of preventing the per-

<sup>88</sup> *Cheavin v. Walker*, 5 Ch. D., 850. *Rahtjen's Composition Co.*, 183 U. S., 1, 22 Sup. Ct. Rep., 6, reversing

<sup>89</sup> *Brill v. Singer M. Co.*, 41 Ohio St., 127. S. C., 41 C. C. A., 329, 101 Fed., 257, which reversed S. C., 97 Fed.,

<sup>90</sup> *Holzapfel's Composition Co. v.* 949.

petration of a fraud by defendant in thus acquiring the benefit of the good-will and reputation of the plaintiff's business.<sup>91</sup>

§ 1075. **Medical preparation; blacking.** The use of plaintiffs' name in connection with a medical preparation manufactured by them being established, they are entitled to an injunction to restrain the use of their name by defendant in connection with his preparation.<sup>92</sup> So where plaintiffs and defendant were manufacturers of blacking, and defendant sold his blacking in bottles which not only resembled those of plaintiffs, but were labeled in a similar manner, the only difference being that plaintiffs' label described their blacking as "manufactured by Day & Martin," and defendant's label described his as "equal to Day & Martin's," the words "equal to" being printed in very small type, an injunction was granted *ex parte* to restrain defendant from using any labels in imitation of plaintiffs'.<sup>93</sup>

§ 1076. **Form, color, size and shape of packages.** A trade mark being usually something indicative of origin or ownership by adoption or repute, and something distinct from the article itself which the mark or name designates, there can be no trade mark in the exterior form or color of the article, and hence no injunction to protect plaintiff in the manufacture of an article of a particular form or color.<sup>94</sup> So a package or barrel can not, by reason of its peculiar form, dimensions or shape, independent of any symbol, figure or device impressed upon or connected with it, constitute a trade mark, and will not be protected by injunction.<sup>95</sup> Nor

<sup>91</sup> Singer Mfg. Co. v. June Mfg. Co., 163 U. S., 169, 16 Sup. Ct. Rep., 1002; Centaur Co. v. Neathery, 34 C. C. A., 118, 91 Fed., 891; Centaur Co. v. Killenberger, 87 Fed., 725.

<sup>92</sup> Frese v. Bachof, 13 Blatch., 234.

<sup>93</sup> Day v. Binning, C. P. Cooper, 489.

<sup>94</sup> Fairbanks v. Jacobus, 14 Blatch., 337.

<sup>95</sup> Moorman v. Hoge, 14 Int. Rev. Record, 155, U. S. Circuit Court, District of California, October Term, 1871; S. C., 2 Sawy., 78.



can the use of a tin pail with certain ornamental designs, in which are contained articles of merchandise for sale, be recognized as a trade mark so as to entitle plaintiff to an interlocutory injunction.<sup>96</sup> And where plaintiffs do not show any special right in respect to the form, size or color of the packages in which their preparation is put up for sale, the labels upon the two articles being sufficient to distinguish the one from the other, even to a careless observer, an interlocutory injunction will be refused as to such matters.<sup>97</sup> Where, however, taking the form of plaintiff's packages, the color of the wrappers and papers done up with them and the form and color of the labels, all considered together, defendant using them for the purpose of passing off his wares as those of plaintiff, a proper case is presented for relief by injunction.<sup>98</sup> Thus, the use by defendants in the sale of medicines of a bottle having the same form as those used by plaintiffs, with the same words stamped or blown in the glass, may be enjoined.<sup>99</sup> So the use of packets or wrappers, in putting up defendant's goods for market, which are so similar to plaintiff's as to induce purchasers to believe that in buying defendant's goods they are buying those of plaintiff, affords sufficient ground for relief by injunction.<sup>1</sup> And in such case proof of a single sale by defendant of the simulated article will warrant the relief.<sup>2</sup> So defendant may be enjoined from using a ticket or label

<sup>96</sup> *Harrington v. Libby*, 14 *Alexander v. Morse*, 14 R. I., 153; *Blatch.*, 128. *Lever v. Goodwin*, 36 Ch. D., 1;

<sup>97</sup> *Frese v. Bachof*, 13 *Blatch.*, *Low v. Hart*, 90 N. Y., 457. See also *Keller v. Goodrich Co.*, 117

*Ind.*, 556, 19 N. E., 196; *Smail v. Sanders*, 118 *Ind.*, 105, 20 N. E., 296.

<sup>98</sup> *Frese v. Bachof*, 14 *Blatch.*, 432; *Sawyer v. Horn*, 4 *Hughes*, 239; *S. C.*, 1 *Fed.*, 24; *Sawyer v. Kellogg*, 7 *Fed.*, 720; *Cook & Bernheimer Co. v. Ross*, 73 *Fed.*, 203; 153.

*Scheuer v. Muller*, 20 C. C. A., 161, 74 *Fed.*, 225; *Parlett v. Guggenheimer*, 67 *Md.*, 542, 10 *Atl.*, 81; <sup>99</sup> *Alexander v. Morse*, 14 R. I., 153.

<sup>1</sup> *Lever v. Goodwin*, 36 Ch. D., 1; *Low v. Hart*, 90 N. Y., 457.

<sup>2</sup> *Low v. Hart*, 90 N. Y., 457.

in connection with his goods which is so similar to that used by plaintiff and in which he has established his right to a trade mark as to deceive purchasers.<sup>3</sup> And where the right to the use of a certain shaped bottle and label thereon are clear and the fact of infringement is satisfactorily established upon interlocutory application, a preliminary injunction should be granted and the refusal of the court to grant the writ amounts to such an abuse of discretion as will be reversed on appeal.<sup>4</sup> And where a manufacturer puts up an article in packages so similar in size, shape and color to plaintiff's as to mislead the purchasing public, it is no defense that in selling the article the defendant is particular to point out that the goods are not of plaintiff's make, where, as in such case, it is possible for the unscrupulous retailer to sell the goods as those of the plaintiff.<sup>5</sup>

§ 1077. **Brand; wrappers; omnibus; hotel.** The adoption of a particular brand, the effect of which would be to mislead the public by inducing them to buy the goods as those of another person, will not be permitted.<sup>6</sup> And the mak-

<sup>3</sup> Orr Ewing v. Johnston, 13 Ch. D., 434, affirmed on appeal to the House of Lords, 7 App. Cas., 219.

<sup>4</sup> Hires Co. v. Consumers' Co., 41 C. C. A., 71, 100 Fed., 809.

<sup>5</sup> Fairbank Co. v. Bell Mfg. Co., 23 C. C. A., 554, 77 Fed., 869.

<sup>6</sup> Seixo v. Provezende, 1 L. R. Ch., 192; Godillot v. Harris, 81 N. Y., 263. In Johnson v. Bauer, 27 C. C. A., 374, 82 Fed., 662, plaintiff was engaged in selling plasters upon the wrappers of which they had placed as a trade mark a red Greek cross from which the article had come to be known as "Red Cross Plasters." Defendants were selling the same article but with a Maltese cross with

a red center upon which appeared their initials. It was held that as defendants were using a symbol or device which would result in their article coming to be known by the same name as plaintiff's, the use of that device constituted an infringement which should be enjoined. And additional ground for relief was held to lie in the fact that since the device was attached to the wrapper and not to the article itself, if less than a whole package were ordered or bought, the symbol would not be seen at all and it would therefore be impossible to detect the differences even though the devices might be entirely unlike.

ing up of goods in a form resembling complainant's, or the use of similar wrappers or labels, whether the similarity consists in size, color, shape, or general appearance, will generally be considered strong presumptive evidence of piracy.<sup>7</sup> So the running of an omnibus, having names and devices similar to those of complainants, and sufficiently like them to deceive the public and draw away complainants' business, will be restrained.<sup>8</sup> So, too, the name of a hotel is

<sup>7</sup> *Croft v. Day*, 7 Beav., 84; *Holloway v. Holloway*, 13 Beav., 209; *Blofield v. Payne*, 4 B. & A., 410; *Frese v. Bachof*, 14 Blatch., 432; *Parlett v. Guggenheimer*, 67 Md., 542, 10 Atl., 81. See also *Keller v. Goodrich Co.*, 117 Ind., 556, 19 N. E., 196; *Smail v. Sanders*, 118 Ind., 105, 20 N. E., 296.

<sup>8</sup> *Knott v. Morgan*, 2 Keen, 213. This was a bill filed by the proprietors of the London Conveyance Company, stating that the company was established under a deed, which was set forth in the bill, for the purpose of running omnibuses between certain points; that their omnibuses were of a novel and superior construction; and that the defendant, with the view and design of fraudulently procuring the custom of persons who were in the habit of using the omnibuses of the plaintiffs, began to run between the same points an omnibus on which were painted the words "Conveyance Company," and "London Conveyance Company," in such characters and parts of the omnibus as exactly to resemble the same words on the omnibuses of the plaintiffs; that a star and garter were, in like manner, painted on the omni-

bus of the defendant, so as exactly to resemble the same symbol on the omnibuses of the plaintiffs; and that the green livery and gold hat bands, by which the plaintiffs distinguished the coachmen and conductors of their omnibuses, were in like manner imitated by the defendant. The bill further stated that the plaintiffs served a notice upon the defendant, intimating that an injunction would be applied for if the defendant continued to use the title and insignia by which the omnibuses of the plaintiffs were distinguished; and that, after such notice, the defendant obliterated from the back of his omnibus the word "Company," and painted on each side of his omnibus, over the words "Conveyance Company," the word "Original," and between the words "Conveyance" and "Company," the word "for" in very small and invisible characters, so that there were then painted on the back of the defendant's omnibus the words "London Conveyance," and on each side the words "Original Conveyance for Company." The bill stated that the coachmen and conductors employed by the defendant continued to wear the same livery,

a trade mark which equity will protect by injunction.<sup>9</sup> But a word from a foreign language, signifying that the article is warranted, being unintelligible to purchasers, would seem not to come within the rule.<sup>10</sup>

§ 1078. **Title of literary production, magazine or newspaper.** The general principles upon which is founded the jurisdiction of equity over the piracy of trade marks are likewise extended to literary publications, and an author or publisher acquires a right of property in the title of his work, or in the use of his name in connection therewith, for the violation of which he may properly apply to a court of equity for relief.<sup>11</sup> Thus, the publication of a magazine in the name of one who has ceased to authorize it will be enjoined. A distinction, however, is taken between representing the work as original, although under the same title, and advertising it as that of another author.<sup>12</sup> And while the relief

and it charged that such colorable imitation of the name and title of the London Conveyance Company was a fraud upon the plaintiffs and the public, and it prayed an injunction. Lord Langdale, Master of the Rolls, after disposing of a preliminary question, held as follows: "The only other question is, whether the defendant fraudulently imitated the title and insignia used by the plaintiffs for the purpose of injuring them in their trade; and, upon the affidavits and evidence before me, I have not the least doubt that the defendant did intend to induce the public to believe that the omnibus which he painted and appointed, so as to resemble the carriages of the plaintiffs, was, in fact, an omnibus belonging to the plaintiffs and the other proprietors of the London Conveyance Company. It

is not to be said that the plaintiffs have any exclusive right to the words "Conveyance Company," or "London Conveyance Company," or any other words; but they have a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representations that carriages, really the defendant's, belong to, and are under the management of the plaintiffs."

<sup>9</sup> *Woodward v. Lazar*, 21 Cal., 448.

<sup>10</sup> *Gout v. Aleploglu*, 6 Beav., 69, note.

<sup>11</sup> *Bell v. Locke*, 8 Paige, 75; *Hogg v. Kirby*, 8 Ves., 215; *Chappell v. Sheard*, 2 Kay & J., 117.

<sup>12</sup> *Hogg v. Kirby*, 8 Ves., 215.

will be granted to restrain defendant from using the name of complainant's newspaper, yet it must clearly appear that the name is used in such manner as to deceive and mislead the public, and to injure complainant in the good-will of his own publication.<sup>13</sup> Thus, an injunction has been refused in behalf of the proprietor of an old established newspaper called "The Mail," to restrain defendant from publishing a paper under the name of "The Morning Mail."<sup>14</sup> But where plaintiffs had long been the publishers of a paper under the name of "The National Police Gazette," by which name it was widely and generally known and circulated throughout the country, defendants were enjoined from publishing or selling a paper under the name of "The United States Police Gazette," the words "Police Gazette" in defendants' paper being printed in similar type to the same words in plaintiffs' paper, and a similar imitation characterizing the general form, style, type and device of defendants' paper, thereby misleading purchasers into the belief that they were purchasing plaintiff's paper.<sup>15</sup> But where plaintiff has published but a few copies of his newspaper and there has been no user by him of the name under which it has been issued such as would give him the exclusive right to its use, defendant will not be enjoined from publishing a paper under the same name.<sup>16</sup>

§ 1079. **Newspapers; fraudulent use of name of play; songs.** It is also to be remarked that an injunction is proper only in such cases as are clear, or at least free from all reasonable doubt. Thus, where defendant has sold his newspaper, with all the profits, rights and incidents pertaining to it, and afterward, and at the same place, begins another under a name somewhat similar, a doubt as to the identity

<sup>13</sup> *Bell v. Locke*, 8 Paige, 75.

<sup>15</sup> *Matsell v. Flanagan*, 2 Ab. Pr.

<sup>14</sup> *Walter v. Emmont*, 54 L. J. R. N. S., 459.  
N. S. Ch., 1059.

<sup>16</sup> *Licensed Victuallers N. Co. v. Bingham*, 58 L. J. N. S. Ch., 36.

of the two papers is sufficient ground for withholding the relief.<sup>17</sup> And the publication must have an actual existence before equity will interfere, and one who has advertised his intention of publishing a periodical under a certain name does not thereby acquire such an exclusive right to that name, in advance of publication, as will entitle him to an injunction.<sup>18</sup> But where plaintiff is presenting a dramatic composition under a name by which it has come to be known to the public, defendant may be enjoined from presenting a similar play under a name which is so nearly identical with first as to result in deceiving the public to the consequent injury of the plaintiff.<sup>19</sup> And where a song has been rendered popular by being sung by a particular person, its publication with a picture of the singer upon the title page, with a statement where and by whom it has been sung, gives the owner such rights of property therein as will authorize the interference of equity to restrain a similar publication in imitation thereof, even though the words of the song are changed.<sup>20</sup> Nor will it avail the defendant that he has warned his servants or employees to explain to purchasers that the songs are different.<sup>21</sup>

§ 1080. **Firm name as trade mark; sale of business goodwill and name; name of foreign firm protected.** The sale

<sup>17</sup> *Snowden v. Noah*, Hopk. Ch., 347. plaintiff had a trade mark or right to the exclusive use of the name in question. They strongly intimate, however, that he had not.

<sup>18</sup> *Maxwell v. Hogg*, 2 L. R. Ch. App., 307. The decision is upon the ground of preventing unfair competition in business. See, *ante*, § 1045.

<sup>19</sup> *Hopkins Amusement Co. v. Frohman*, 202 Ill., 541, 67 N. E. 391. In this case plaintiff was presenting a play under the name of "Sherlock Holmes." Defendant was enjoined from advertising, producing or performing a similar play under the name "Sherlock Holmes, Detective." The court refused to decide whether or not

<sup>20</sup> *Chappell v. Sheard*, 2 Kay & J., 117.

<sup>21</sup> *Chappell v. Davidson*, 2 Kay & J., 123; S. C., on appeal, 8 DeGex, M. & G., 1; *Morgan v. Schuyler*, 79 N. Y., 490.

of one's interest in a co-partnership carries with it the goodwill of the business, together with all advantages that may pertain to the firm name or place of business. Hence a retiring partner will not be allowed to renew the business under such a name as to imply that he is the successor to the old firm.<sup>22</sup> Upon the formation of a partnership, a trade mark belonging to one of the partners, in the absence of any agreement to the contrary, becomes partnership property,<sup>23</sup> and on the dissolution of the firm, in the absence of any stipulation or agreement, each of the partners has the right to use the mark.<sup>24</sup> The use, by new partners or their successors, of the old trade mark of a firm, is not considered a piracy, since it is merely equivalent to an announcement that the new partners are continuing the business formerly carried on by those whose name constituted the trade mark.<sup>25</sup> But when a firm of mercantile partners dissolves and each resumes business for himself, one of such partners may be enjoined from using the former firm name upon his sign in such manner as to indicate the continuance of the firm. And the test in such cases is, that the sign or mark must be false in fact, and be so known to the person using it, and must be used with the intention of deceiving and be of such a character as to mislead a person of ordinary caution. But the injunction may be granted upon no other proof of an intention to deceive than arises from the fact of such false representation and of its necessary tendency to deceive.<sup>26</sup> And a trade mark which is indicative of origin or ownership in the original proprietor of the

<sup>22</sup> *Churton v. Douglas*, 5 Jur. N. S., 887; *S. C.*, *John.*, 174.

<sup>23</sup> *Bury v. Bedford*, 33 L. J. Ch. 465.

<sup>24</sup> *Banks v. Gibson*, 34 Beav., 566.

<sup>25</sup> *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L., 523.

<sup>26</sup> *Peterson v. Humphrey*, 4 Ab.

*Pr.*, 394. And see, as to the use by a continuing partner of the old firm name as a trade mark after a dissolution and the retiring of one member from the firm, and the right to an injunction in such case, *Hallett v. Cumston*, 110 Mass., 29.

article, as "Twin Brothers" applied to yeast manufactured by brothers who are twins, may be sold by one of the proprietors as an appurtenance to the business which he sells; and in such case the purchaser may enjoin one of the twin brothers from using the trade mark in the same business.<sup>27</sup> So a merchant, having carried on business under the name of "Little Jake" as a trade mark, and having sold the business and the right to use such name, covenanting not to engage in the same business in that city, nor to authorize any other person to use such words, may be enjoined from violating the covenant. And the associates of defendant in establishing the rival business, in such case, may also be enjoined.<sup>28</sup> So partners who have sold their interest in the business and good-will of a firm may be enjoined from conducting a rival business in the vicinity, under a name so similar to that of the old firm as to mislead customers, the relief being granted in such case against all persons engaged in the new enterprise.<sup>29</sup> And a foreign firm which has built up a profitable business under a firm name is entitled to an injunction restraining a local corporation from the piracy of plaintiff's firm name.<sup>30</sup>

§ 1081. **Corporate name protected; fraudulent intent unnecessary; suit by attorney-general; exceptions to rule.** The interposition of equity is frequently invoked upon behalf of corporations for the protection of their right to the use of the name under which they are incorporated. And it may be stated as a general rule that where a corporation is doing business under a name the right to which it has acquired by its incorporation and prior use, an injunction will lie against another corporation which has been subsequently

<sup>27</sup> *Burton v. Stratton*, 12 Fed. Mich., 215, 19 N. W., 961, 20 N. W., 696. See also *Kidd v. Johnson*, 100 545.  
U. S., 617.

<sup>28</sup> *Grow v. Seligman*, 47 Mich., 607, 11 N. W., 404.

<sup>29</sup> *Myers v. Kalamazoo B. Co.*, 54 Co., (1901) 2 Ch., 513.

<sup>30</sup> *Societe Anonyme des Anciens Etablissements Panhard et Levassor v. Panhard Levassor Motor*



organized under the same name or one so similar as to result in confusion, restraining it from such unauthorized use of plaintiff's corporate name.<sup>31</sup> And the right to the use of such name being matter of record, equity will not refuse to enjoin its improper use by a defendant corporation because the right has not been established at law. Nor does the jurisdiction to restrain the piratical use of such name rest upon the insolvency of the defendant. But the corporation whose name is improperly used must itself be a party to the suit, and the proceedings can not be brought by one of its bondholders, unless it has refused to proceed after being requested so to do.<sup>32</sup> And an injunction has been granted to restrain a proposed new corporation from applying for registration under a corporate name so similar to that of a corporation already existing as to be liable to mislead persons into the belief that it was the same.<sup>33</sup> So where a foreign corporation has taken out a license under the name of an older local corporation, the use of such name will be enjoined.<sup>34</sup> And where relief is sought for the protection of the plaintiff's right to the use of its corporate name, actual fraudulent intent upon the part of the defendant is unnecessary, and the injunction is properly allowed although the defendant may have acted in entire innocence and good faith in choosing its name, provided the resemblance between the two is such as to result in confusion and consequent injury to the plaintiff's business.<sup>35</sup> And the at-

<sup>31</sup> *Newby v. Oregon Company*, 1 St. Rep., 769; *Investor Publishing Co. v. Dobinson*, 72 Fed., 603.  
<sup>32</sup> *Newby v. Oregon Company*, 1 Deady, 609.

*v. M. P. B. & L. Assn.*, 159 Pa. St., 308, 28 Atl., 215; *American Clay Mfg. Co. v. A. C. M. Co.*, 198 Pa. St., 189, 47 Atl., 936; *Armington v. Palmer*, 21 R. I., 109, 42 Atl., 308, 43 L. R. A., 95, 79 Am. St. Rep., 786; *Higgins Co. v. Higgins Soap Co.*, 144 N. Y., 462, 39 N. E., 490, 27 L. R. A., 42, 43 Am.

*St. Rep.*, 769; *Investor Publishing Co. v. Dobinson*, 72 Fed., 603.  
<sup>33</sup> *Hendriks v. Montagu*, 50 L. J. R. N. S. Ch., 456.  
<sup>34</sup> *American Clay Mfg. Co. v. A. C. M. Co.*, 198 Pa. St., 189, 47 Atl., 936.

<sup>35</sup> *American Clay Mfg. Co. v. A. C. M. Co.*, 198 Pa. St., 189, 47 Atl.,

torney-general, acting upon behalf of the state, may enjoin the unauthorized use of the word "University" as applied to defendant's business of conducting a school for commercial instruction, defendant thereby holding his school out as an institution authorized to confer degrees where no such authority in fact exists.<sup>36</sup> But where one corporation adopts the corporate name of another but uses it in a widely different locality with characteristics which so clearly distinguish it that confusion is improbable, the use of such name will not be enjoined in the absence of proof that actual injury has resulted therefrom.<sup>37</sup> And where the defendant, in adopting the word "Hygeia" as part of its corporate name, was acting in perfectly good faith and without any knowledge of plaintiff's prior adoption of the same word as part of its name, and had invested large sums of money in its business in which it was actively engaged, while the plaintiff although incorporated prior to defendant, had never engaged in business and was a mere paper corporation having no business or assets except its corporate franchise, it was held a proper exercise of discretion to refuse an injunction against the use of the word "Hygeia" by defendant as a

936; *Armington v. Palmer*, 21 R. I., 109, 42 Atl., 308, 43 L. R. A., 95, 79 Am. St. Rep., 786; *Red Polled C. C. of A. v. Red Polled C. C. of A.*, 108 Iowa, 105, 78 N. W., 803.

<sup>36</sup> *Commonwealth v. Banks*, 198 Pa. St., 397, 48 Atl., 277. This was an action to enjoin defendant, Banks, from using the name "University of Philadelphia" in connection with his business of running a school for commercial instruction. The bill was filed by the attorney-general upon behalf of the state. A statute provided for the incorporation of institutions of

learning and for a board known as the "College and University Council" and prescribed that no institution of learning should confer degrees unless authorized by the council to do so. It was held that as a university is understood to be an institution authorized to confer degrees, and as no university could do so without the permission of the council and as defendant had no such authority, he had no right to the use of the name in question and the injunction was accordingly granted.

<sup>37</sup> *Investor Publishing Co. v. Dobinson*, 82 Fed., 56.

part of its corporate name.<sup>38</sup> And in accordance with principles heretofore announced,<sup>39</sup> plaintiff can not, by adopting as part of its corporate name a word which is purely descriptive, designating the article which they are engaged in manufacturing, thus acquire the exclusive right to the use of that word, and defendant will therefore not be enjoined from using the same word as part of its corporate name.<sup>40</sup>

§ 1081 *a*. **Right of foreign corporation; conflict of authority.** As to the right of a foreign corporation doing business in a state other than that of its domicile to invoke the aid of equity against a domestic corporation which has been subsequently organized under the laws of the state in question and has adopted the corporate name of the former for the purpose of acquiring the benefit of the good-will of its business, there is a direct conflict of authority. It has been held both in the state and federal courts that the relief is properly denied in such cases upon the ground that the foreign corporation is permitted to do business in another state only upon principles of comity and that those principles should not go to the extent of requiring a domestic corporation to cease the use of a name which has been conferred upon it by the sovereign power of the state.<sup>41</sup> The better view and the one more in accord with the principles of equity has been adopted by other courts which hold that the junior domestic corporation has no right thus to pirate the use of plaintiff's corporate name and that the sovereign power of the state can not confer upon it the right thus to perpetrate a wrong, and that the senior corporation, although organized under the laws of another state and doing business in the state in question only upon principles of

<sup>38</sup> *Hygeia Water Ice Co. v. N. Y. H. I. Co.*, 140 N. Y., 94, 35 N. E., 417.      <sup>40</sup> *Aerators, Limited, v. Tallitt*, (1902) 2 Ch., 319.

<sup>41</sup> *Hazelton Boiler Co. v. Hazel-*

<sup>39</sup> § 1064, *ante*.

comity, is nevertheless entitled to the aid of a court of equity, either state or federal, to restrain such an unauthorized and fraudulent use of its corporate name.<sup>42</sup>

ton Tripod Boiler Co., 142 Ill., 494, 30 N. E., 339; Lehigh V. C. Co. v. Hamblen, 23 Fed., 225. The language in the Hazelton case may well be considered a *dictum* since in that case the complainant was the junior corporation, while defendant was the senior.

<sup>42</sup> Peck Bros. & Co. v. Peck Bros. Co., 51 C. C. A., 251, 113 Fed., 291; Red Polled C. C. of A. v. Red Polled C. C. of A., 108 Iowa, 105, 78 N. W., 803. The reasoning of Jenkins, J., in the Peck Bros. case, *supra*, seems unanswerable. Among other things, he says: "We are compelled, with deference, to differ with the learned court, (in Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 142 Ill., 494, 30 N. E., 339, *supra*,) if it intended to hold that incorporation under the laws of the state of Illinois protects one from the consequences of his own wrong. In a certain limited sense the sovereignty of the state had conferred the name. There is, however, in the term "sovereignty," no magic to conjure by. It can confer upon individuals no right to perpetrate wrong. Nor do we think that the sovereignty of the state of Illinois sought to do that. It has a general law of incorporation, by which any body of men combining for the purpose of business may incorporate under any name they may select. The name is not imposed by the law, but is chosen by the incorporators. With that selection the sovereignty

of the state has nothing to do. The act of sovereignty allowing incorporation is permissive, not mandatory. It sanctions the act of incorporation under the name and for the business proposed, if that name and that business be otherwise lawful. The sovereign by the act of incorporation adjudges neither the legality of the business proposed, nor of the name assumed. That is matter for judicial determination by a court having jurisdiction of the subject when the legality of the business or of the name is called in question. If one may not use the name imposed upon him *in invitum* so that it shall work wrong to another, by what token may he become incorporated under a name selected by himself to effect like wrong? And how is the sovereignty of a great state impugned by the denial to incorporators of a right to perpetrate such a wrong? Is it possible that a sovereignty of a state can be thus invoked to perpetrate a fraud? If it may be, then indeed will that sovereignty stand for oppression, and not for justice. Then could one who, in connection with a business to which his name had been attached and had given value to it, having disposed of the right to use that name to another, and so by the law prohibited from using it in connection with a like business under circumstances that would work a fraud, be enabled to ef-

§ 1082. **Name of mineral water protected.** The protection extended by courts of equity to trade marks is not confined to artificial commodities, or to such as are the result of human ingenuity and skill. The essence of the injury consisting in the fraudulent sale by defendant of the goods or commodities of complainant as his own, the violation of right is the same, whether the commodity in question has been produced by the hand of nature or of man. And where the owner of a natural product, such as mineral water, has applied to it a particular name, under which name he has built up a large and profitable business in the sale of the article, he is entitled to an injunction to protect him in the exclusive use of the name.<sup>43</sup> And complainants who have purchased the spring and the interest of the original owners, who invented and adopted the trade mark, are entitled to the same protection as the original owners themselves.<sup>44</sup> And where one has adopted and applied a particular name, as "Bethesda" or "Clysmic," to the waters of his spring, under which they have become widely known as a valuable commodity and article of commerce, and have acquired a high reputation as a remedial agent in certain diseases, the owner of a spring upon adjacent premises may be restrained from using the same word to distinguish the waters of his spring.<sup>45</sup> So the use of the word "Ap-

fect the fraud by simply becoming incorporated under that name under the sovereignty of the state of Illinois. We cannot bend our judgment to the conclusion that a sovereign state designed thus to confer immunity for wrong."

<sup>43</sup> Congress Co. v. High Rock Co., 45 N. Y., 291; S. C., 10 Ab. Pr. N. S., 348, reversing S. C., 57 Barb., 526; Dunbar v. Glenn, 42 Wis., 118.

<sup>44</sup> Congress Co. v. High Rock Co., *supra*.

<sup>45</sup> Dunbar v. Glenn, 42 Wis., 118; Hill v. Lockwood, 62 Wis., 507, 22 N. W., 581. And see Wheeler v. Johnston, 3 L. R. Ir., 284. The opinion of the court in Dunbar v. Glenn, 42 Wis., 118, as delivered by Mr. Justice Cole, very clearly states the principles applicable to cases of this nature. He says, p. 137: "The learned counsel for the defendants insisted that the word 'Bethesda,' as used by the plaintiff, denotes the kind, character,

pollinis'' by defendants on their labels and bottles for the sale of a particular water, in connection with the representation of a bow and arrow or anchor, has been enjoined because of its resemblance to the word "Appolinaris" and the representation of an anchor as used by plaintiff on his bottles.<sup>46</sup>

§ 1082 *α*. **Union labels.** Since, in order to entitle one to protection in favor of a trade mark, an exclusive proprietary right to its use must be shown, the members of a voluntary association who have adopted a symbol or device such as a

quality or utility of the waters of her spring, and therefore could not be a lawful trade mark. But we do not understand that the plaintiff uses or applies the word in any such sense or for any such purpose. It will avail little to resort to the original meaning of the word 'Bethesda' as defined by biblical writers. It is sufficient to say that the word, as used by the plaintiff, does not describe any quality of the water. It seems to have been adopted to indicate origin or ownership and to have a name by which the water could be distinguished when bought and sold in the market. The plaintiff has a right to the exclusive use of the word, when employed as a trade mark for such a purpose. The cases cited on the brief of defendants' counsel clearly recognize such a right. Where the trade mark, in its original signification or by association, distinctively points to the origin or ownership of the article manufactured, and can be employed with truth by other manufacturers, it is not entitled to legal protection as a trade mark. *Canal Co. v. Clark*, 13 Wal., 311; *Brooklyn White Lead Co. v. Masury*, 25 Barb., 416; *Wolfe v. Goulard*, 18 How. Pr., 64; *Burke v. Cassin*, 45 Cal., 468; *Stokes v. Landgraff*, 17 Barb., 608; *Corwin v. Daly*, 7 Bosw., 222; *Caswell v. Davis*, 58 N. Y., 223; *Choynski v. Cohen*, 39 Cal., 501; *Perry v. Truefitt*, 6 Beav., 66. But this case does not fall within any of the exceptions stated to the rule in the above cases. Here the plaintiff adopted and applied the name 'Bethesda' to her spring to mark or distinguish the waters thereof in the market; and she has the right to its exclusive use. It is not intended to, nor does it, indicate the quality or constituents of the water, but rather its origin or ownership; and is designed as a name for distinguishing the water, by which it may be bought and sold. It follows from these views that the order of the circuit court dissolving the injunction must be reversed, and the cause remanded for further proceedings according to law."

<sup>46</sup> *Brunnen v. Somborn*, 14 Blatch., 380.

union label which is attached to articles manufactured by any members of the union so long as they remain members but no one of whom has any exclusive right or right independent of his membership to the use of the device, can not enjoin those who are not members of the association from the use of the same or a similar label upon their own products. In such case, the essential elements of a trade mark are wanting since such a device neither denotes the origin or ownership of the goods of a particular individual, nor is it the sole property of one person to the exclusion of all others, and the relief is therefore properly denied.<sup>47</sup> Nor can the action be maintained by the trustees or other officers of the association acting in their official capacity, since, in addition to the reasons indicated, no property rights are involved.<sup>48</sup> A different case, however, is presented where a member of such an association is engaged in a business which is directly and injuriously affected by defendant's unauthorized use of the union label; and where plaintiff, in selling his goods, is enabled to procure a higher price for them by reason of the use of the device in question, defendant, who is not a member of the union, may be enjoined from the unauthorized use of the union label whereby he is able to pass his goods off as those of the plaintiff and thus to secure the benefit of the good-will of the latter's business. The relief is granted, however, in such case, not because of any right in the plaintiff to the exclusive use of the union label as a trade mark, but to protect him from the fraudulent and wrongful practices of the defendant which result in the wrongful diversion of plaintiff's business.<sup>49</sup> But in any event, to entitle plaintiff to relief by injunction, he must come into a court of equity with clean

<sup>47</sup> *Weener v. Brayton*, 152 Mass., 235, 22 Atl., 912, 13 L. R. A., 101, 25 N. E., 46, 8 L. R. A., 640.      <sup>48</sup> 377, 27 Am. St. Rep., 625.

<sup>49</sup> *McVey v. Brendel*, 144 Pa. St.,      <sup>49</sup> *Carson v. Ury*, 39 Fed., 777, 5 L. R. A., 614.

hands. Where, therefore, plaintiffs use their union label not only as a device to be attached to their goods, but as a means or medium for applying opprobrious epithets to those who are not members of their association for the purpose of injuring those who thus fail or refuse to join, they can have no standing in the court of conscience, and equitable relief will therefore be denied.<sup>50</sup>

§ 1082 *b*. **Contributory infringement.** Where defendant, although not guilty himself of a direct infringement of plaintiff's trade mark or of an attempt to pass off his goods to his immediate purchaser as those of the plaintiff, is nevertheless so conducting his business as to place it within the immediate power of other persons to do so, with the reasonable probability that infringement by them will result, a court of equity may properly interfere by injunction to prevent such unauthorized conduct upon the part of the defendant. Thus, where plaintiff was engaged in the manufacture and sale of "Hostetter's Bitters" in bottles and defendant was selling the same article under the name of "Host Style Bitters" in large demijohns but was furnishing his customers with bottles similar to plaintiff's and containing the latter's labels, it was held that equitable relief should be granted because, although the purchasers from defendant were not deceived, he was placing it directly within their power to practice a deception upon others.<sup>51</sup> So where defendant is manufacturing an article of bitters which closely resembles plaintiff's in appearance and taste and is selling it to his customers in bulk, advising them to refill with it bottles which originally contained plaintiff's article and then to sell such refilled bottles as plaintiff's product, such conduct amounts to contributory infringement and is properly

<sup>50</sup> *McVey v. Brendel*, 144 Pa. St., 235, 22 Atl., 912, 13 L. R. A., 377, C. A., 295, 79 Fed., 996.  
<sup>51</sup> *Hostetter Co. v. Becker*, 25 C. 27 Am. St. Rep., 625.



enjoined.<sup>52</sup> So where a manufacturer puts up an article in packages so similar in size, shape, color and general appearance to those of plaintiff as to mislead and deceive intending purchasers, it is no defense that the manufacturer is always careful to sell the packages to the retailer as being goods other than those of the plaintiff, where it is thus possible for the unscrupulous retailer to palm them off upon the public as plaintiff's product.<sup>53</sup> Upon similar principles it was held to constitute an infringement of plaintiff's trade mark in the word "Sapolio" as applied to a particular brand of soap, where, upon several occasions when plaintiff's agent called at defendant's store and asked for "Sapolio," defendant's salesman, on every occasion, produced and offered a different soap known as "Pride of the Kitchen," making no explanation as to the difference and receiving the customary price therefor, and an injunction was accordingly granted although there was no resemblance in size, shape or general appearance between the two articles.<sup>54</sup>

§ 1082 **Store of peculiar architectural design.** As well illustrating the difference between cases involving technical

<sup>52</sup> Hostetter Co. v. Brueggeman Distilling Co., 46 Fed., 188.

<sup>53</sup> Fairbank Co. v. Bell Mfg. Co., 23 C. C. A., 554, 77 Fed., 869. In this case Lacombe, J., says: "It may be conceded that the defendant never, by any of its officers or agents, intimated to its salesmen that they should recommend the defendant's packages as being readily disposed of to consumers who asked for and wished to have complainant's. But such oral commendation was certainly unnecessary. A survey of the two packages placed side by side would sufficiently suggest this possibility to a dishonest dealer. We have, then, the case of a man-

ufacturer who is careful always to sell its goods as its own, but who puts them up in a style of package so similar to that used by one of its competitors, earlier in the market, that unscrupulous dealers, who purchase from the manufacturer in order to sell at retail to consumers, are enabled to delude a large number of such retail purchasers by palming off upon them the goods of the manufacturer as those of its competitor. That this is unfair competition seems apparent, both on reason and authority."

<sup>54</sup> Morgan's Sons Co. v. Wenderover, 43 Fed., 420.

trade marks and those of unfair competition, and the principles by which the latter are governed, it has been held that where plaintiff had established and built up a large business in a store which was constructed of an unusual and peculiar style of architecture, of which there was nothing else like it in the city, and thereupon defendants proceeded to engage in the same line of business and to erect a store building immediately adjoining plaintiff's in every respect of similar architecture, for the purpose of stealing plaintiff's business and securing the patronage of his customers, a proper case was presented for the interposition of equity by injunction, the relief being granted not upon the theory of protecting plaintiff in the assertion of the exclusive right to a particular style of architecture but for the sole purpose of preventing the perpetration of a fraud by the defendant in thus attempting to steal the benefit of the good-will and reputation of plaintiff's business. And in such case a mandatory injunction is properly granted requiring defendant to distinguish his place of business from plaintiff's in some manner which will sufficiently indicate to the public that it is a different establishment from that of the plaintiff.<sup>55</sup>

§ 1082 *d*. **Submitting new design to court.** Where defendant, in using a particular name, mark or design, is clearly guilty of an infringement of plaintiff's trade mark or of the charge of unfair competition in trade, the court, having found such infringement, should grant the injunction at once and should not, before issuing the writ, permit the defendant to submit a new and what is claimed will be a non-infringing device, nor should it give its approval

<sup>55</sup> *Weinstock v. Marks*, 109 Cal., 529, 42 Pac., 192, 30 L. R. A., 182, 50 Am. St. Rep., 57. In this case the lower court had issued a mandatory injunction requiring defendant to place signs inside and outside his building showing the proprietorship thereof. The supreme court modified this as indicated in the text.

in advance to a change in the form of the trade mark to be adopted for the purpose of avoiding the liability of infringement.<sup>56</sup> And where the lower court has thus allowed defendant to adopt certain new and non-infringing matter, the reviewing court will refuse, upon an appeal from the injunctive order, to consider the question whether the defendant was entitled to adopt the new device, but will wait until the question is regularly presented upon issues properly framed and evidence taken thereunder.<sup>57</sup>

§ 1083. **Relief against former employee.** While one who has been in the actual employ of a firm of established reputation in a particular business may, on beginning business of a similar character on his own account, inform the public that he has been in such employment, yet if he uses the

<sup>56</sup> *Hires Co. v. Consumers' Co.*, 41 C. C. A., 71, 100 Fed., 809; *Sterling Remedy Co. v. Spermine Medical Co.*, 50 C. C. A., 657, 112 Fed., 1000. In *Hires Co. v. Consumers' Co.*, *supra*, Jenkins, J., says: "The court below, upon holding that the changed label of the defendant infringed the complainant's right, caused to be submitted for its approval another form of label, which it approved, and authorized the defendant to use upon bottles of the same form as those used by the complainant. We greatly doubt the propriety of such action. When an infringement has been found it should be restrained. A court of equity does not sit as an arbiter to determine in advance upon other and changed labels which the infringer may adopt to avoid the condemnation of the court. Whether such changed forms do in fact infringe is matter of fact to be determined

by the court in its usual course of procedure upon complaint lodged by the party damnified. The duty of the court below was to determine whether the labels complained of in the bill infringed the complainant's right. That duty was fully performed when the court had so determined. It is not called upon to decide whether a new label proposed for adoption would infringe. This is especially so here, where the infringement was deliberate and designed. In such case the court ought not to say how near the infringer may lawfully approximate the label of the complainant, but should cast the burden upon the guilty party of deciding for himself how near he may with safety drive to the edge of the precipice, and whether it be not better for him to keep as far from it as possible."

<sup>57</sup> *Williams v. Mitchell*, 45 C. C. A., 265, 106 Fed., 168.

name of the former firm in such manner as to mislead persons into the belief that he is carrying on the same business, or a branch of the business of the old firm, an injunction will be allowed.<sup>58</sup> But in such case the court may, before granting the relief, require satisfactory proof, not only that defendant's use of the name is likely to mislead the public, but that complainant has warned him that it will have that effect.<sup>59</sup> And where defendant is in the employ of plaintiff, who is the proprietor of certain medicines, and surreptitiously obtains possession of plaintiff's recipes and copies them, and after leaving plaintiff's employ uses them in making the medicines and selling them with printed directions similar to plaintiff's, an injunction may be allowed on the ground of breach of trust.<sup>60</sup>

§ 1084. **Accounting.** As in the case of infringement of patents or copyrights, one whose trade mark has been pirated is entitled to an account of the profits accruing to defendant by reason of his wrongful appropriation of the trade mark.<sup>61</sup> But where one has, in good faith, purchased articles bearing a spurious mark, for the purpose of again selling them in the course of trade, he will only be required to account for such profits as may have accrued after notice of the piracy.<sup>62</sup> And although an injunction may be granted, even where the *scienter* is not proved,<sup>63</sup> the court may withhold an account of profits, where the owner of the trade mark has been guilty of laches in seeking protection against the piracy.<sup>64</sup>

<sup>58</sup> *Glenny v. Smith*, 2 Dr. & Sm., 476; *Williams v. Osborne*, 13 L. T. N. S., 498. And see *Croft v. Day*, 7 Beav., 84.

<sup>59</sup> *Williams v. Osborne*, 13 L. T. N. S., 498.

<sup>60</sup> *Yovatt v. Winyard*, 1 Jac. & W., 394.

<sup>61</sup> *Burgess v. Hills*, 26 Beav., 244; *Cartier v. Carlile*, 31 Beav., 292.

<sup>62</sup> *Moet v. Couston*, 33 Beav., 578.

<sup>63</sup> *Harrison v. Taylor*, 11 Jur. N. S., 408.

<sup>64</sup> *McLean v. Fleming*, 96 U. S., 245, 24 L. Ed., 828; *Fairbank Co. v. Luckel, K. & C. S. Co.*, 54 C. C. A., 204, 116 Fed., 332; *Harrison v. Taylor*, 11 Jur. N. S., 408.

## II. PRINCIPLES GOVERNING THE RELIEF.

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§ 1085. **The general doctrine stated.** The fundamental principle governing the jurisdiction of equity in restraint of the infringement of trade marks is, that when one produces an article of merchandise, calling it by a particular name and selling it with a particular mark, he thereby acquires such an exclusive right to the use of that name or mark as entitles him to restrain all others from its use to designate articles of a similar appearance or kind. And if another person uses such name or mark, for the purpose of selling goods of an inferior quality, although of similar external appearance, whereby purchasers may be misled into the belief that they are buying the goods of the original maker, the injury done to him is sufficient ground for relief

by injunction.<sup>1</sup> To warrant the exercise of equitable jurisdiction in these cases, there must be, first, the existence of a trade mark; second, the fact of an imitation, either directly or with such variations as are merely colorable; and third, the fact that such imitation is made without the license, or acquiescence of the owner.<sup>2</sup> And courts of equity, in granting relief by injunction in this class of cases proceed upon the principle that it is a fraud upon one who has established a trade and carried it on under a given name to permit another to assume that name, or the same name with a slight alteration, in such manner as to induce persons to deal with him in the belief that they are dealing with one who has given a reputation to that name. Where, therefore, plaintiffs have long been engaged in a given locality, under a particular name, and defendant embarks in the same business under substantially the same name, with the intention of deceiving purchasers by inducing them to believe that it is plaintiffs' business, and he does so deceive them, a proper case is presented for relief by injunction. But in such case it is proper to confine the injunction to the use of the name in a particular place, since the tendency to mislead is largely dependent upon the place where the name is used.<sup>3</sup>

§ 1086. **Deception must be shown.** It seems to follow necessarily from the principles already stated that, since false representation is the principal ground for relief in equity by injunction against the piracy of a trade mark, when no false representation or deceit is used, defendant only endeavoring, by his advertisement and by selling the article complained of, to show to the public that the article is

<sup>1</sup> *Hirst v. Denham*, L. R. 14 Eq., 542. And see this case as to the effect of plaintiff defrauding the public

<sup>2</sup> *Kinahan v. Bolton*, 15 Ir. Ch., 75. by short weight as a bar to relief in equity.

<sup>3</sup> *Lee v. Haley*, L. R. 5 Ch., 155.

that of his own manufacture, equity will not interfere in the absence of any evidence of persons having been misled or deceived in the matter, even though defendant may also use as designating his article the name of the original manufacturer of the article sold by plaintiff.<sup>4</sup> And when upon the case presented there is no evidence of fraud or of deceitful representation, the court will decline to interfere.<sup>5</sup> Nor will the court enjoin unless it is satisfied that deception will result from the use by defendants of the device or mark which it is sought to enjoin as a piracy, or that there is a probability of such deception, or unless the act of defendant is calculated to deceive. And the burden of proof in such cases rests upon plaintiff, and in the absence of proof of such deception the injunction will be refused.<sup>6</sup> So, too, when there is no intention upon the part of defendants to appropriate, and no probability of their appropriating plaintiff's business, and the similarity in the names used is not such as necessarily to lead to the inference of any intention to deceive, and when there is no proof of actual deception by the use of the name adopted by defendants, although it somewhat resembles that of plaintiff, the relief will be refused.<sup>7</sup> And when the points of difference between the two articles are so marked and striking as at once to produce an impression upon inspection that they are different productions, an action for an injunction can not be maintained, since the court will not interfere when the resemblance is not such as will result in deception.<sup>8</sup> Nor will

<sup>4</sup> *Singer M. Co. v. Loog*, 18 Ch. D., 395. But see *Singer Machine Manufacturers v. Wilson*, 3 App. Cas., 376, reversing S. C., 2 Ch. D., 434.

<sup>5</sup> *Cheavin v. Walker*, 5 Ch. D., 850.

<sup>6</sup> *Cope v. Evans*, L. R. 18 Eq., 138. See also *Desmond's Appeal*,

103 Pa. St., 126; *Civil Service Supply Association v. Dean*, 13 Ch. D., 512.

<sup>7</sup> *Merchants Banking Company v. Merchants Joint Stock Bank*, 9 Ch. D., 560; *Wrisley Co. v. Iowa Soap Co.*, 59 C. C. A., 54, 122 Fed., 796.

<sup>8</sup> *Talcott v. Moore*, 1 N. Y.

the relief be granted unless defendant's mark or label, taken as a whole, is so similar to plaintiff's that a purchaser exercising ordinary care in the matter would be likely to be misled.<sup>9</sup>

§ 1087. **Fraudulent intent not necessary; partial piracy; when fraudulent intent immaterial.** While actual deception or a tendency to deceive in the use by defendants of the trade mark in question or in cases of unlawful competition is, as is thus seen, essential to lay the foundation for equitable relief, it is not to be inferred that an actual fraudulent intent need be proven to warrant the exercise of the jurisdiction.<sup>10</sup> Indeed, it may be laid down as a general rule, that to constitute piracy of a trade mark no fraudulent intent is necessary, and the injunction may be granted, even though defendant was ignorant that the devices or symbols used were the property of another.<sup>11</sup> And if the acts complained of have a tendency to mislead the public, a denial of fraudulent intent will not prevent equity from granting the relief.<sup>12</sup>

Weekly Dig., 485; *Manufacturing Co. v. Trainer*, 101 U. S., 51. 43 L. R. A., 95, 79 Am. St. Rep., 786; *Red Polled C. C. of A. v. Red*

<sup>9</sup> *Solis Cigar Co. v. Pozo*, 16 Col., 388, 26 Pac., 556, 25 Am. St. Rep., 279. Polled C. C. of A., 108 Iowa, 105, 78 N. W., 803; *Kenny v. Gillet*, 70 Md., 574, 17 Atl., 499; *Tarrant &*

<sup>10</sup> *Jameson v. Dublin Distillers Co.*, (1900) 1 L. R. Ir., 43; *Saxlehner v. Apollinaris Co.*, (1897) 1 Ch., 893; *Clement v. Maddick*, 1 Gif., 98; *Hier v. Abrahams*, 82 N. Y., 519; *Waterman v. Shipman*, 130 N. Y., 301, 29 N. E., 111; *Taendsticksfabriks A. V. v. Myers*, 139 N. Y., 364, 34 N. E., 904; *Drake Medicine Co. v. Glessner*, 68 Ohio St., 337, 67 N. E., 722; *Pratt's Appeal*, 117 Pa. St., 401, 11 Atl., 878; *American Clay Mfg. Co. v. A. C. M. Co.*, 198 Pa. St., 189, 47 Atl., 936; *Armington v. Palmer*, 21 R. I., 109, 42 Atl., 308, *Co. v. Hoff*, 22 C. C. A., 644, 76 Fed., 959, 33 L. R. A., 250; *Fairbank Co. v. Luckel Soap Co.*, 42 C. C. A., 376, 102 Fed., 327. See also *Singer Machine Manufacturers v. Wilson*, 3 App. Cas., 376, reversing S. C., 2 Ch. D., 434.

<sup>11</sup> *Millington v. Fox*, 3 Myl. & Cr., 338; *Rodgers v. Nowill*, 6 Hare, 325; *Coffeen v. Brunton*, 4 McLean, 516; *Davis v. Kendall*, 2 R. I., 566; *Tarrant & Co. v. Hoff*, 22 C. C. A., 644, 76 Fed., 959, 33 L. R. A., 250.

<sup>12</sup> *Edelsten v. Vick*, 11 Hare, 84.



Nor is it necessary in cases of this character to prove actual fraud upon the part of defendant, or that the credit of plaintiff is injured by the sale of an inferior article, the injury to plaintiff's trade by loss of custom being sufficient ground for relief. And the injunction may be granted, even though the persons buying of defendant the goods bearing plaintiff's mark were aware that they were not the goods of plaintiff's manufacture.<sup>13</sup> Nor is it necessary to prove that persons have actually been deceived in buying defendant's goods under the belief that they were plaintiff's, provided the resemblance is such as to cause the one to be mistaken for the other.<sup>14</sup> Upon the other hand, a fraudulent intent upon the part of the defendant to deceive the public and to pass his goods off as those of the plaintiff is immaterial where the differences between the two are so marked and the resemblances so few that the likelihood or possibility of deception is very remote.<sup>15</sup> But the relief may be granted, although the whole of a trade mark does not appear to have been pirated.<sup>16</sup>

§ 1088. **Resemblance must deceive ordinary purchasers.** In applications for relief by injunction against the piracy of trade marks, the question to be considered is, not whether manufacturers or persons skilled in that particular business could distinguish between the two articles, but whether the

<sup>13</sup> *Edelsten v. Edelsten*, 1 DeGex, J. & S., 185; *Braham v. Bustard*, 11 W. R., 1061. In *Edelsten v. Edelsten*, plaintiff, a manufacturer of wire marked with an anchor, and which had become known as "Anchor Brand Wire," was allowed an injunction against an infringement consisting in the marking by defendant of his wire with the device of a crown and anchor.

<sup>14</sup> *Edelston v. Edelston*, 1 De -

*Gex, J. & S.*, 185; *Braham v. Bustard*, 11 W. R., 1061; *Jameson v. Dublin Distillers Co.*, (1900) 1 L. R. Ir., 43; *Taendsticksfabriks A. V. v. Myers*, 139 N. Y., 364, 34 N. E., 904.

<sup>15</sup> *Kann v. Diamond Steel Co.*, 32 C. C. A., 324, 89 Fed., 706; *Centaur Co. v. Marshall*, 38 C. C. A., 413, 97 Fed., 785.

<sup>16</sup> *Braham v. Bustard*, 11 W. R., 1061.

general public would be likely to be deceived by the alleged imitation.<sup>17</sup> Nor is it requisite that the degree of resemblance should be such as to deceive persons on seeing the marks side by side, but it must be such that ordinary purchasers, proceeding with ordinary care, would be likely to be deceived.<sup>18</sup> And where the court is of opinion that the use of defendant's name or device on a literary publication is not such as to mislead persons of ordinary intelligence into purchasing defendant's publication for that of complainant, an injunction will be withheld.<sup>19</sup> Nor will the use

<sup>17</sup> *Shrimpton v. Laight*, 18 Beav., 164.

<sup>18</sup> *Seixo v. Provezende*, L. R. 1 Ch., 192; *McLean v. Fleming*, 6 Otto, 245, 24 L. Ed., 828; *Robinson v. Storm*, 103 Tenn., 40, 52 S. W., 880; *Drake Medicine Co. v. Glessner*, 68 Ohio St., 337, 67 N. E., 722; *Pillsbury v. Pillsbury Flour Mills Co.*, 12 C. C. A., 432, 64 Fed., 841; *Stuart v. Stewart & Co.*, 33 C. C. A., 480, 91 Fed., 243; *Fairbank Co. v. Luckel Soap Co.*, 42 C. C. A., 376, 102 Fed., 327; *Glen Cove M. Co. v. Ludeling*, 22 Fed., 823. In *Pillsbury v. Pillsbury Flour Mills Co.*, 12 C. C. A., 432, 64 Fed., 841, *supra*, Jenkins, J., says: "We must remember, in considering this and like cases, that the purchaser of goods, with respect to brands by which the goods are designated, is not bound to exercise a high degree of care. A specific article of approved excellence comes to be known by certain catch-words easily retained in memory, or by a certain picture which the eye readily recognizes. The purchaser is required only to use that care which persons ordinarily exercise under

like circumstances. He is not bound to study or reflect; he acts upon the moment. He is without the opportunity of comparison. It is only when the difference is so gross that no sensible man, acting on the instant, would be deceived, that it can be said that the purchaser ought not to be protected from imposition. Indeed, some cases have gone to the length of declaring that the purchaser has a right to be careless, and that his want of caution in inspecting brands of goods with which he supposes himself to be familiar ought not to be allowed to uphold a simulation of a brand that is designed to work a fraud upon the public. However that may be, the imitation need only to be slight if it attaches to what is most salient, for the usual inattention of a purchaser renders a good will precarious if exposed to imposition."

<sup>19</sup> *Bradbury v. Beeton*, 39 L. J. Ch. N. S., 57. In this case plaintiffs, who were the proprietors of a long established weekly comic periodical called "Punch," were refused an injunction against the

of a particular label be restrained upon the ground of its general resemblance to the trade mark of another manufacturer, where defendant's label differs in those points which a purchaser would be most likely to examine to ascertain whose article he was purchasing.<sup>20</sup> Even though defendant's trade mark which it is sought to enjoin as an infringement does in some respect resemble plaintiff's, yet if the resemblance is not such as to deceive ordinary purchasers or persons of ordinary intelligence, a court of equity will decline to interfere.<sup>21</sup> So when the differences between the two devices are so palpable that a person of ordinary care and diligence would not be deceived, equity will not enjoin.<sup>22</sup>

§ 1089. **The same.** While courts of equity may properly interfere by injunction to prevent one person from imposing upon or deceiving the customers of another by means of simulated labels, *indicia* or advertisements, yet to warrant the relief the devices adopted to the prejudice of the earlier business must be such as would ordinarily lead persons dealing in the article in question to suppose defendant's article to be that of plaintiff. In other words, the resemblance or simulation must be one from which deception and imposition may result, and when this does not appear an injunction will not lie. When, therefore, plaintiff seeks to enjoin defendant from circulating a printed book descriptive of

publication by defendants of a rival publication of a similar character called "Punch and Judy," defendants' publication bearing a different illustration upon the cover, and being sold at a different price.

<sup>20</sup> Blackwell v. Crabb, 36 L. J. Ch., 504.

<sup>21</sup> Blackwell v. Wright, 73 N. C., 310; Heinz v. Lutz, 146 Pa. St., 592, 23 Atl., 314; Solis Cigar Co. v.

Pozo, 16 Col., 388, 26 Pac., 556, 25 Am. St. Rep., 279.

<sup>22</sup> Leather Cloth Co. v. American Leather Cloth Co., 11 H. L., 523; opinion of Wright, J., in Partidge v. Menck, How. Ap. Cas., 547, affirming S. C., 2 Barb. Ch. 101; Columbia Mill Co. v. Alcorn, 150 U. S., 460, 14 Sup. Ct. Rep., 151; Wrisley Co. v. Iowa Soap Co., 59 C. C. A., 54, 122 Fed., 796.

medicines manufactured and sold by him, but the differences between the two books are so great as at once to produce the impression that both the books and the medicines are different, an injunction will be denied.<sup>23</sup> But, while it is often a matter of great difficulty to determine what degree of resemblance will constitute a piracy, it is to be observed that the test is not whether a wary and cautious person would be likely to be misled by the imitation, but whether it is such as would deceive the unwary and careless.<sup>24</sup> And it should, at least, appear that the resemblance is such as to raise the probability of mistake on the part of the public, or of a design and purpose on the part of the defendant to deceive the public.<sup>25</sup>

§ 1090. **Colorable imitation; when name publici juris.** Equity does not, however, require an exact similarity in the name or device used by defendant as a condition of its interference by injunction against an infringement of plaintiff's trade mark, and a colorable imitation in the device which requires a careful inspection to distinguish it from the original is sufficient ground for invoking the aid of equity, the relief being granted when the similarity is such as to mislead and deceive an ordinary purchaser in the exercise of ordinary care and caution.<sup>26</sup> And where plaintiff has for many years been engaged in the manufacture and sale of pills, under a particular name and device, and defendant sells pills under a name *idem sonans*, contained in boxes of the same form as plaintiff's, and with wrappers of the same general appearance, the resemblance between defendant's packages and those of plaintiff being such as to

<sup>23</sup> Tallcott v. Moore, 6 Hun, 106.

<sup>24</sup> Seixo v. Provezende, L. R. 1 Ch., 192; Williams v. Spence, 25 How. Pr., 366.

<sup>25</sup> McCartney v. Garnhart, 45 Mo., 593. And see Filley v. Fassett, 44 Mo., 168.

<sup>26</sup> McLean v. Fleming, 6 Otto, 245, 24 L. Ed., 828; Godillot v. Harris, 81 N. Y., 263; Drake Medicine Co. v. Glessner, 68 Ohio St., 337, 67 N. E., 722; Kosterling v. Seattle B. & M. Co., 54 C. C. A., 76, 116 Fed., 620.

mislead an ordinary purchaser, an injunction will be allowed.<sup>27</sup> And while it is true that a word used as a trade mark, and entitled to protection as such, may become *publici juris* by general use, so as to disentitle plaintiff to relief in equity, yet the test in determining whether it has become thus public is, whether its use by persons other than the original owner is calculated to deceive the public.<sup>28</sup>

§ 1091. **Representations as to quality; prospectus of company; holding plaintiff out as responsible for business.** It is not every false statement with respect to articles sold which constitutes such a grievance as to warrant the interference of a court of equity, and a distinction is to be drawn between representations that the goods are the same as those of another, and statements that they are in fact the identical goods of another person, when in reality they are not. While, therefore, the person selling may represent his goods to be equal to or the same as those of another dealer, when they are inferior in quality, or different in kind, or that he is the inventor, when, in fact, he is a mere imitator, yet if he does not represent his goods as the actual manufacture of another, equity will not interfere, but will leave the parties to their remedy at law.<sup>29</sup> But the unauthorized publication of one's name in the prospectus of a company as one of its trustees will be restrained.<sup>30</sup> So the carrying on by defendant of a business in such a way as to induce the belief upon the part of the general public that plaintiffs are back of the business and responsible for it will be enjoined.<sup>31</sup>

§ 1091 *a*. **Injury to individual and not to public basis for relief; defendant's article superior to plaintiff's.** It is to

<sup>27</sup> McLean v. Fleming, 6 Otto, 523; Clarke v. Freeman, 11 Beav., 245, 24 L. Ed., 828. 112.

<sup>28</sup> Ford v. Foster, L. R. 7 Ch., 611. <sup>30</sup> Routh v. Webster, 10 Beav., 563.

<sup>29</sup> Leather Cloth Co. v. Ameri- <sup>31</sup> Walter v. Ashton, (1902) 2 can Leather Cloth Co., 11 H. L. Ch., 282.

be observed that courts of equity, in granting injunctive relief against unfair competition or for the protection of trade marks, act primarily for the preservation and protection of the property rights of the individual and not for the purpose of saving the general public from fraud or imposition, except in so far as they may incidentally do so in protecting plaintiff's individual property rights.<sup>32</sup> It follows, therefore, that where plaintiff's rights are thus invaded, it constitutes no defense to the application for an injunction that the defendant's goods are of an equal or superior quality to those of the plaintiff. Indeed, it is regarded rather as an aggravation of the wrong that the defendant is selling an article of a superior quality since a greater injury is inflicted upon

<sup>32</sup> *Weener v. Brayton*, 152 Mass., 101, 25 N. E., 46 8 L. R. A., 640; *American Washboard Co. v. Saginaw Mfg. Co.*, 43 C. C. A., 233, 103 Fed., 281, 50 L. R. A., 609; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L., 523. In *American Washboard Co. v. Saginaw Mfg. Co.*, *supra*, Day, J., says: "We do not find it anywhere averred that the defendant, by means of its imitation of complainant's trade-mark, is palming off its goods on the public as and for the goods of complainant. The bill is not predicated upon that theory. It undertakes to make a case, not because the defendant is selling its goods as and for the goods of complainant, but because it is the manufacturer of a genuine aluminum board, and the defendant is deceiving the public by selling to it a board not made of aluminum, although falsely branded as such, being in fact a board made of zinc material; that is to say, the

theory of the case seems to be that complainant, manufacturing a genuine aluminum board, has a right to enjoin others from branding any board "Aluminum" not so in fact, although there is no attempt on the part of such wrongdoer to impose upon the public the belief that the goods thus manufactured are the goods of complainant. We are not referred to any case going to the length required to support such a bill. It loses sight of the thoroughly established principle that the private right of action in such cases is not based upon fraud or imposition upon the public, but is maintained solely for the protection of the property rights of complainant. It is true that in these cases it is an important factor that the public are deceived, but it is only where the deception induces the public to buy the goods as those of complainant that a private right of action arises."

plaintiff where his goods are likely to be supplanted in the esteem of his customers by those of the defendant than in the case of an inferior article, where the competition is likely to be of but a temporary character. The law therefore requires the defendant, if he produces a superior article, to do so upon the strength of his own good name and not upon the good name and reputation of plaintiff's business.<sup>33</sup>

§ 1091 *b*. **Defendant distinguishing by use of name; ignorance of infringement; defendant notifying customers to cease infringing; threatened infringement sufficient.** Where plaintiff has acquired the right to the exclusive use of a word, name or mark as a trade mark, it constitutes no valid defense that defendant has placed upon the infringing label either his name or a statement that the article is manufactured by himself, since, the article having come to be known by the trade name in question, the ordinary purchaser would be likely to be deceived.<sup>34</sup> Nor will the defendant be allowed to plead ignorance of infringement at the time he purchased the infringing labels since the owner of a trade mark is entitled to protection against ignorant as well as malicious infringement.<sup>35</sup> Nor can an infringer defend upon the ground that he has notified all persons to whom he has sold goods to remove the infringing device and has thereupon gone out of business, where it appears from the fact that he has contested the case closely that he has every intention of availing himself of the reputation of plaintiff's goods.<sup>36</sup> And it is to be observed that actual infringement is not always necessary in order to entitle plaintiff to relief and that a

<sup>33</sup> *Pillsbury v. Pillsbury-Washburn F. M. Co.*, 12 C. C. A., 432, 64 Fed., 841; *Cleveland Stone Co. v. Wallace*, 52 Fed., 431; *City of Carlsbad v. Thackeray & Co.*, 57 Fed., 18.

*Ed.*, 526; *Shaver v. Heller & M. Co.*, 48 C. C. A., 48, 108 Fed., 821; *Roberts v. Sheldon*, 8 Biss., 398; *Battle v. Finlay*, 45 Fed., 796.

<sup>35</sup> *Cuervo v. Landauer*, 63 Fed., 1003.

<sup>34</sup> *Menendez v. Holt*, 128 U. S., 514, 9 Sup. Ct. Rep., 143, 32 L.

<sup>36</sup> *Hutchinson v. Blumberg*, 51 Fed., 829.

threatened infringement which will in all probability be consummated unless restrained, is sufficient.<sup>37</sup>

§ 1092. **Plaintiff's deceit and misrepresentation.** In cases of interference to restrain the piracy of trade marks or to enjoin unfair competition in trade, a strict application is made of the rule that he who would have equity must do equity. And if plaintiff's trade mark or the labels which he has attached to his goods or the name which he has given to them and by which they have come to be known to the public contain in themselves any distinct, substantial and material misstatement or false representation made for the purpose or with the tendency of deceiving the public, either as to the place where the goods are manufactured, or as to their quality or identity, or as to the ingredients of which they are composed, plaintiff himself will be deemed guilty of a fraud as well as the defendant and can therefore not invoke the protection of a court of equity, although the defendant himself is guilty of the piracy complained of.<sup>38</sup> So where plaintiffs

<sup>37</sup> *Cuervo v. Landauer*, 63 Fed., 1003. *v. Foster*, 80 Fed., 896; *Wrisley Co. v. Iowa Soap Co.*, 104 Fed., 548,

<sup>38</sup> *Worden v. California Fig Syrup Co.*, 187 U. S., 516, 23 Sup. Ct. Rep., 161, reversing S. C., 42 C. C. A., 383, 102 Fed., 334; *Manhattan Medicine Co. v. Wood*, 108 U. S., 218, 2 Sup. Ct. Rep., 436; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L., 523; *Kohler Mfg. Co. v. Beeshore*, 8 C. C. A., 215, 59 Fed., 572; *California Fig Syrup Co. v. Putnam*, 16 C. C. A., 276, 69 Fed., 740; *California Fig Syrup Co. v. Stearns & Co.*, 20 C. C. A., 22, 73 Fed., 812, 33 L. R. A., 56; *Raymond v. Royal Baking-Powder Co.*, 29 C. C. A., 245, 85 Fed., 231; *Clotworthy v. Schepp*, 42 Fed., 62; *Krauss v. Peebles' Sons Co.*, 58 Fed., 585; *Hilson Co. v. Foster*, 80 Fed., 896; *Wrisley Co. v. Iowa Soap Co.*, 104 Fed., 548, affirmed in 59 C. C. A., 54, 122 Fed., 796; *Joseph v. Macowsky*, 96 Cal., 518, 31 Pac., 914, 19 L. R. A., 53; *Solis Cigar Co. v. Pozo*, 16 Col., 388, 26 Pac., 556, 25 Am. St. Rep., 279; *Coleman v. Dannenberg*, 103 Ga., 784, 30 S. E., 639, 41 L. R. A., 470, 68 Am. St. Rep., 143; *Connell v. Reed*, 128 Mass., 477; *Siebert v. Abbott*, 61 Md., 276; *Kenny v. Gillet*, 70 Md., 574, 17 Atl., 499; *Houchens v. Houchens*, 95 Md., 37, 51 Atl., 822; *Wolfe v. Burke*, 56 N. Y., 115, reversing S. C., 7 Lans., 151; *Pettridge v. Wells*, 13 How. Pr., 385; *Prince Mfg. Co. v. Prince's Metallic Paint*, 135 N. Y., 24, 31 N. E., 990, 17 L. R. A., 129; *Palmer v. Harris*, 60 Pa. St.,



have acquired whatever property they may have in the article claimed as a trade mark by fraudulent and deceitful representations and advertisements as to its origin and quality, they will not be allowed the aid of an injunction.<sup>39</sup> So it is said if a trade mark falsely represents the goods as patented, there being no patent, the owner is guilty of such misrepresentation as will debar him from relief.<sup>40</sup> But if in such case a court of equity is in doubt as to whether a court of law might not consider the party aggrieved entitled to some relief against defendant, for having used his name in connection with the sale of the article, the bill may be retained until an action at law can be brought to determine the right.<sup>41</sup> And the use of the word "patent" as part of a trade mark of goods which have never been patented will not prevent a party from obtaining an injunction against the infringement of his trade mark, if the word has not been used in such manner as to deceive and mislead the public into the belief that the article was actually protected by patent.<sup>42</sup> Thus, the words "patent thread" may be used as part of a trade mark where they have long been employed in the trade as a term of art to designate a particular kind of thread, although it has never been patented.<sup>43</sup> But the use of statements which, while not

156; *Pidding v. How*, 8 Sim., 477; *Flavel v. Harrison*, 10 Hare, 467; *Perry v. Truefitt*, 6 Beav., 66. See also *Partridge v. Menck*, How. Ap. Cas., 547, affirming S. C., 2 Barb. Ch., 101; *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 4 C. C. A., 264, 54 Fed., 175. And see *Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn., 84, 23 S. W., 165, to the effect that the objection that complainant is guilty of fraud need not be affirmatively set up by answer in order to constitute a defense.

<sup>39</sup> *Seabury v. Grosvenor*, 14 Blatch., 262.

<sup>40</sup> *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L., 523, 543; *Flavel v. Harrison*, 10 Hare, 467; *Cheavin v. Walker*, 5 Ch. D., 850; *Fairbanks v. Jacobus*, 14 Blatch., 337; *Holzappel's Composition Co. v. Rahtjen's Composition Co.*, 183 U. S., 1, 22 Sup. Ct. Rep., 6, reversing S. C., 41 C. C. A., 329, 101 Fed., 257, which reversed S. C., 97 Fed., 949.

<sup>41</sup> *Flavel v. Harrison*, 10 Hare, 467.

<sup>42</sup> *Marshall v. Ross*, L. R. 8 Eq., 651.

<sup>43</sup> *Marshall v. Ross*, L. R. 8 Eq., 651.

strictly accurate, are immaterial and do not mislead or injure the purchasing public in any manner, will be no bar to relief.<sup>44</sup> And where the deceit or fraud upon the part of plaintiff, which is relief upon to defeat his application for equitable relief, is not in the trade mark itself but in a collateral matter, as where the trade mark itself is *bona fide*, but in printed circulars issued by plaintiff he represents himself as a patentee of the article, the trade mark itself containing no false representation, plaintiff may still receive protection by injunction.<sup>45</sup> So, too, it would seem that misrepresentations upon the part of plaintiff as to his own manufacture of goods, if made after the commencement of the suit for injunction, constitute no bar to the relief.<sup>46</sup>

§1093. **Slander of name or business.** To warrant relief by injunction to prevent the infringement of one's trade mark, it is essential that an infringement of some actual property right should be shown. A court of equity will not, therefore, restrain the publication of false statements concerning plaintiff's article upon the ground of protecting his trade mark. Thus, a sewing machine company, which has obtained a premium for the best machine exhibited at a fair, can not enjoin a rival company from publishing that it and not the plaintiff obtained such premium, since this is not an infringement upon any property right, but at the most the statement of a libelous or untruthful matter; and the rule is well established that equity will not enjoin a mere slander or libel, or the utterance of an untruth.<sup>47</sup> And it may be asserted as a general rule that such false representations as amount to the slander of another's reputation and name, and as are calculated to bring them into contempt, do not afford sufficient foundation for the interference of equity, the proper

<sup>44</sup> Tarrant & Co. v. Hoff, 22 C. C. A., 644, 76 Fed., 959.

<sup>45</sup> Ford v. Foster, L. R. 7 Ch. 611.

<sup>46</sup> Siegert v. Findlater, 7 Ch. D., 801.

<sup>47</sup> Singer Manufacturing Co. v. The Domestic Co., 49 Ga., 70.

remedy, if any, being by proceedings at law for a libel.<sup>48</sup> So where plaintiff had infringed defendant's trade mark, and upon proceedings being instituted against him therefor, a settlement was effected upon his giving a written apology with power to defendants to make such use of it as they saw fit, the court refused to restrain defendants from continuing the publication of such apology.<sup>49</sup>

§ 1094. **Fraud on part of plaintiff; uses of opprobrious epithets.** It is also essential that he who seeks the aid of equity for the protection of his trade mark should in all cases come into court with clean hands. And when the business in which plaintiff is engaged is to a certain extent a fraud upon the public, by deceiving them with reference to the nature and qualities of the articles sold by him, as in selling gin under the name of schnapps, and asserting it to be a valuable medicinal compound and a specific for many diseases, such fraudulent representations upon the part of plaintiff will debar him from relief by injunction for the protection of his alleged trade mark.<sup>50</sup> Upon similar principles, relief will be denied where the label or device for the protection of which an injunction is sought is employed by the plaintiff as a means or medium for applying abusive and opprobrious epithets to others.<sup>51</sup>

§ 1095. **Labels.** Preventive relief by injunction is frequently granted for the protection of trade marks consisting in a particular label or brand attached to or designating the article which is manufactured or sold by plaintiff. And in cases of this nature, the mere fact that defendant's label which it is sought to enjoin as a piracy of plaintiff's trade mark indicates the name of the manufacturer is not, in it-

<sup>48</sup> Seeley v. Fisher, 11 Sim., 582;  
Clarke v. Freeman, 11 Beav., 112.

<sup>49</sup> Fisher v. Appollinaris Co., L.  
R. 10 Ch., 297.

<sup>50</sup> Wolfe v. Burke, 56 N. Y. 115,  
reversing S. C., 7 Lans., 151.

<sup>51</sup> McVey v. Brendel, 144 Pa. St.,  
235, 22 Atl., 912, 13 L. R. A., 377,  
27 Am. St. Rep., 625.

self, conclusive evidence of good faith on the part of defendant.<sup>52</sup> So defendant may be restrained from using labels which so closely resemble plaintiff's in color and in general appearance as to mislead purchasers into buying defendant's goods under the belief that they are buying those of plaintiff.<sup>53</sup> And when goods of an inferior quality are put in circulation under a brand which is an imitation of that of plaintiff, he is entitled to protection by injunction.<sup>54</sup> Where, however, a merchant dealing in cigars makes a particular label and sends it to the manufacturer to be put upon cigars of a particular kind to be furnished him by the manufacturer, and the latter afterward supplies cigars of the same description and with the same label to his agents, they will not be enjoined from selling cigars of that label, upon an interlocutory application, in the absence of any evidence of a contract by the manufacturer to sell exclusively to plaintiff.<sup>55</sup> So when the fact of infringement is uncertain and the granting of an injunction might result in greater injury to defendants than its refusal would cause to plaintiffs, it is proper to refuse an interlocutory injunction.<sup>56</sup> And where plaintiff's trade mark consisted in a label of a particular form and description upon bottles sold by him in his business, and it appeared that in many instances similar labels might be and probably were sold for a legitimate purpose, an injunction was refused, in the absence of proof of actual fraud, until plaintiff should establish his right by an action at law; the ground of refusal being that while an injunction might stop defendant's fraudulent use of the label, it might also prevent its legitimate use.<sup>57</sup> But in such a case,

<sup>52</sup> *Slegert v. Findlater*, 7 Ch. D., 891.

<sup>53</sup> *Scheuer v. Muller*, 20 C. C. A., 161, 74 Fed., 225; *Kostering v. Seattle B. & M. Co.*, 54 C. C. A., 76, 116 Fed., 620; *Royal B. P. Co. v. Davis*, 26 Fed., 293.

<sup>54</sup> *Upmann v. Elkan*, L. R. 7 Ch., 130, affirming S. C., L. R. 12 Eq., 140.

<sup>55</sup> *Hirsch v. Jonas*, 3 Ch. D., 584.

<sup>56</sup> *Foster v. Blood Balm Co.*, 77 Ga., 216, 3 S. E., 284.

<sup>57</sup> *Farina v. Silverlock*, 6 DeGex,

after verdict in an action at law establishing plaintiff's right, the injunction may be granted.<sup>58</sup>

§ 1096. **Sale of genuine and original article not enjoined.** The gist of the offense in the piracy of a trade mark consisting in selling the goods of one manufacturer or vendor as those of another, equity will not interfere by injunction to restrain the sale of the original and genuine article itself. Thus, where one purchases the right to stamp upon watches of his own manufacture the name of a celebrated manufacturer, he can not restrain the sale by defendant of the genuine watches which are actually made by such celebrated manufacturer.<sup>59</sup>

§ 1097. **Injunction refused in case of doubt.** The jurisdiction of equity in cases affecting trade marks has been by some courts treated as being not a distinct or substantive jurisdiction, but rather as one which is to be exercised in aid of courts of law, or in cases where an action at law might be maintained. In accordance with this doctrine, it is held that where the legal right of plaintiff is not clear the injunction will not be granted *in limine*.<sup>60</sup> And when the testimony touching plaintiff's ownership and title is so conflicting that it is difficult to determine upon which side the weight of evidence preponderates, equity should not interpose by injunction.<sup>61</sup> So where the question as to defendant's right to use complainant's trade mark is not entirely free from doubt, the injunction will not be allowed if defendants are able to respond in pecuniary damages at law.<sup>62</sup> So if the question as to whether complainant's trade mark has actually been pirated in such a manner as to injure him and to deceive the public

M. & G., 214, reversing S. C., 1 Kay & J., 509.

<sup>58</sup> *Farina v. Silverlock*, 4 Kay & J., 650.

<sup>59</sup> *Samuel v. Buger*, 13 How. Pr., 342.

<sup>60</sup> *Foot v. Lea*, 13 Ir. Eq., 484;

*Marshall v. Pinkham*, 52 Wis., 572, 9 N. W., 615.

<sup>61</sup> *Witthaus v. Braun*, 44 Md., 303.

<sup>62</sup> *Howe v. Howe Machine Co.*, 50 Barb., 236.

is involved in doubt, or if it be doubtful whether complainant has such a legal right as would justify an injunction, the relief should not be allowed until the cause is heard upon pleadings and proof, or until complainant has established his right at law.<sup>63</sup> And, in general, it may be said that equity will not interfere where complainant's right is not clearly established, especially where it appears that both parties were originally concerned in the manufacture of the article as copartners.<sup>64</sup> But, in order to defeat complainant's right to appropriate a particular symbol or term on the ground of its having been previously in common use, it must appear that such use extended to and included complainants.<sup>65</sup>

§ 1098. **Promise to refrain no bar to injunction.** We have already seen, in discussing the interference of equity to prevent the infringement of patents for inventions, that a patentee, whose rights have been infringed, is not bound to rely on the assurances or promises of the person infringing that he will not repeat the wrong, and that such promises constitute no bar to relief by injunction.<sup>66</sup> The same doctrine prevails in cases of the piracy of trade marks, and the owner of a mark or device which has been illegally taken by another is entitled to an injunction, notwithstanding defendant's promise to refrain from continuing the piracy.<sup>67</sup>

§ 1099. **Name of periodical protected.** Equity may properly interfere by injunction for the protection of a name or title applied to a periodical or newspaper.<sup>68</sup> Thus, where

<sup>63</sup> *Partridge v. Menck*, 2 Barb. Ch. R., 101, affirming S. C., 2 Sandf. Ch., 622, affirmed How. Ap. Cas., 547; *Spottiswoode v. Clark*, 2 Ph., 154. But in the latter case it is held that defendant may in the meantime be required to keep an account.

<sup>64</sup> *Coffeen v. Brunton*, 5 McLean, 256.

<sup>65</sup> *Newman v. Alvord*, 49 Barb., 588.

<sup>66</sup> See § 976, *ante*.

<sup>67</sup> *Routh v. Webster*, 10 Beav., 561; *Welch v. Knott*, 4 Kay & J., 747; *Millington v. Fox*, 3 Myl. & Cr., 338; *Clark Thread Co. v. Wm. Clark Co.*, 55 N. J. Eq., 658, 36 Atl., 599.

<sup>68</sup> *Clement v. Maddick*, 1 Gif.,

plaintiffs were the proprietors of a newspaper known as "Bell's Life," they were allowed an injunction to restrain defendant from publishing a newspaper under the title of "Penny Bell's Life," even though no fraudulent intention was shown, the use of the name adopted by defendant being likely to injure plaintiffs by causing purchasers of defendant's paper to suppose that they were buying that of plaintiff.<sup>69</sup> So where plaintiff was the proprietor of a weekly newspaper called "The Britannia," which he subsequently incorporated with another newspaper called "The John Bull," and thereafter issued the publication under the title of "The John Bull and Britannia," defendant, who had been the printer and publisher of plaintiff's paper under its former title, was enjoined from printing or publishing a paper called the "True Britannia," in imitation and as a continuation of plaintiff's paper.<sup>70</sup> And where a series of juvenile books of uniform appearance have long been published under the name of "Chatterbox," and have become widely known and popular under that name, the purchaser of an exclusive territorial right to the use of such name in connection with the same publications is entitled to protection by injunction in the use of the name.<sup>71</sup> Where, however, upon a bill to enjoin an alleged infringement of a trade mark, consisting of the name of a periodical published by plaintiff, if from the agreed statement of facts, upon which the case is submitted, it does not appear whether the public are actually deceived, or are in danger of being deceived by the infringement as alleged in the bill, or whether plaintiff's customers or the public are induced to believe that defendant's publication is that of plaintiff, the case will be referred to a master to ascertain and report upon such matters

98; *Prowett v. Mortimer*, 2 Jur. N. S., 414.

<sup>69</sup> *Clement v. Maddick*, 1 Gif., 98.

<sup>70</sup> *Prowett v. Mortimer*, 2 Jur. N. S., 414.

<sup>71</sup> *Estes v. Williams*, 22 Blatch., 364; *Estes v. Leslie*, 27 Fed., 22.

before any relief will be granted.<sup>72</sup> And the proprietor of a newspaper which had for many years been established under the name of "Morning Post," was refused an injunction to prevent the use of the name "Evening Post" in the publication of a daily newspaper by defendant, there being no evidence of injury to plaintiff from the use of such names.<sup>73</sup>

§ 1100. **Diligence necessary.** Reasonable diligence must be used in making the application for relief against piracy of a trade mark, and proceedings should be instituted promptly upon the discovery of the fraud.<sup>74</sup> And where defendants had used the name which was sought to be enjoined for a period of more than nine years, with full knowledge on the part of complainant, such delay was held sufficient ground for dissolving the injunction.<sup>75</sup> And a delay of six months in instituting proceedings, plaintiff having full knowledge of all the circumstances, has been held sufficient ground for refusing relief.<sup>76</sup> But the person injured may relieve himself from the consequences of delay by showing that he had protested against the use of his mark.<sup>77</sup> And the fact that defendant has for many years made use of the trade mark in question, in advertising his article under that designation, will not deprive plaintiffs of relief by injunction when they are not shown to have acquiesced in such use, and when they have, by their own advertisements, cautioned the public against imposition.<sup>78</sup> So a plaintiff seeking relief in this class of cases is justified in waiting a sufficient length of time

<sup>72</sup> *Osgood v. Allen*, 1 Holmes, Barb., 151; S. C., 6 Ab. Pr. N. S., 185. 265. See also *Filley v. Child*, 16

<sup>73</sup> *Borthwick v. Evening Post*, 37 Blatch., 376.

Ch. D., 449.

<sup>75</sup> *Estcourt v. Estcourt Hop Essence Co.*, L. R. 10 Ch., 276.

<sup>74</sup> *French Republic v. Saratoga* V. S. Co., 191 U. S., 427, 24 Sup. Ct. Rep., 145, affirming S. C., 46 C. C. A., 418, 107 Fed., 459; *Chappell v. Sheard*, 2 Kay & J., 117; *Estes v. Worthington*, 22 Fed., 822.

<sup>77</sup> *Motley v. Downman*, 3 Myl. & Cr., 1; *Harrison v. Taylor*, 11 Jur. N. S., 408. And see, *ante*, § 7.

<sup>78</sup> *Kinahan v. Bolton*, 15 Ir. Ch., 75.

<sup>75</sup> *Amoskeag Co. v. Garner*, 55



to enable him to procure evidence that the use of the name or device in question by defendant does actually deceive the public by leading them to believe that defendant's business is that of plaintiff.<sup>79</sup>

§ 1101. **Limitations upon the doctrine.** It is also held that mere lapse of time upon the part of plaintiff, after learning of the infringement of his trade mark, will not of itself and independent of other circumstances deprive him of relief in equity, since the injunction in such cases is granted in aid of the legal right, and the right being clear, equity interposes its preventive aid for its protection.<sup>80</sup> And in proceedings for contempt in the violation of an injunction restraining the use of a trade mark, in order to deprive plaintiff of his right to carry on such proceedings upon the ground of his acquiescence, that acquiescence must be such as to create a new right in the defendant.<sup>81</sup>

<sup>79</sup> *Lee v. Haley*, L. R. 5 Ch., 155. S., 514, 9 Sup. Ct. Rep., 143. And

<sup>80</sup> *Fullwood v. Fullwood*, 9 Ch. see, *ante*, § 10 *a*.

D., 176; *Menendez v. Holt*, 128 U. <sup>81</sup> *Rodgers v. Nowill*, 3 DeGex, M. & G., 614.

## III. PARTIES.

- § 1102. Agent; alien; tenants in common; defendants.  
 1103. Assignee; change in firm.  
 1104. Different persons entitled to same name.  
 1105. Defendants.

§ 1102. **Agent; alien; tenants in common; defendants.** With regard to the parties entitled to the relief, it is held that the owner and his agent can not join in the action, although the agent's name appears on the trade mark.<sup>1</sup> But the relief resting upon the personal injury resulting from the use of complainant's mark, proceedings may be had against the offender wherever he resides, regardless of the *locus* of the offense. Hence an alien may bring the action, without averring that the goods of defendant have actually been sold within the jurisdiction where relief is sought.<sup>2</sup> Nor will the relief be refused an alien because similar relief is withheld from aliens in the country to which complainant belongs.<sup>3</sup> Where the trade mark is the property of several tenants in common, the relief may be had by either of them individually.<sup>4</sup> And every one engaging in the sale of the spurious goods may be enjoined as a party to the fraud.<sup>5</sup>

§ 1103. **Assignee; change in firm.** The property in a trade mark being susceptible of assignment to anyone who takes at the same time the right to manufacture or sell the particular merchandise to which the trade mark pertains, the assignee may enjoin an infringement of the right.<sup>6</sup> And where the mark thus assigned designates truly the place where the

<sup>1</sup> Delondre v. Shaw, 2 Sim., 237.

<sup>5</sup> Coats v. Holbrook, 2 Sandf. Ch.,

<sup>2</sup> Taylor v. Carpenter, 11 Paige, 587.

202; Collins Co. v. Brown, 3 Kay & J., 423; Collins Co. v. Cowen, Ib., 428.

<sup>3</sup> Dixon v. Grugenheim, 2 Phil. Legal Gazette, 105; Julian v. Hoosier D. Co., 78 Ind., 408. And see

<sup>3</sup> Coats v. Holbrook, 2 Sandf. Ch., 587.

Congress Co. v. High Rock Co., 45 N. Y., 291; S. C., 10 Ab. Pr. N. S.,

<sup>4</sup> Dent v. Turpin, 2 J. & H. 139.

348, reversing S. C., 57 Barb., 526.

goods are manufactured, and indicates with a reasonable degree of certainty their ownership, the fact that owing to changes in the firm, by death and otherwise, the name on the label is not the exact name of the manufacturers, does not constitute a sufficient objection to warrant a court of equity in withholding relief, in the absence of any attempt at deception.<sup>7</sup> So an assignee of the original manufacturer of a medical preparation, who has obtained the exclusive right to use the name given to such preparation by the original maker, may enjoin an infringement upon his right. And in such case, the fact that plaintiffs have expended much money in bringing their medicine into public use and have made its manufacture profitable and have invested their property in the business, while defendant has but recently and not extensively engaged therein, and is seeking to avail himself of the reputation which the efforts of others have given to the article, may properly be taken into account upon considering the application for the injunction.<sup>8</sup>

§ 1104. **Different persons entitled to same name.** Where two persons are engaged in distinct and separate trades at different places, both having derived from a common predecessor the right to use a particular name as a trade mark, one of the two may maintain a bill in his own name to enjoin a piracy of his trade mark.<sup>9</sup>

§ 1105. **Defendants.** In an action to enjoin the infringement of the name or title of a periodical published by plaintiffs, persons who are only engaged in selling the infringing publication may be joined with its publishers as defendants, the acts of both parties being kindred and they being engaged in a common injury to plaintiffs.<sup>10</sup>

<sup>7</sup> *Dixon v. Grugenheim*, 2 Phil. Legal Gazette, 105.

<sup>9</sup> *Dent v. Turpin*, 2 John. & H., 139.

<sup>8</sup> *Filkins v. Blackman*, 13 Blatch., 440.

<sup>10</sup> *Matzell v. Flanagan*, 2 Ab. Pr. N. S., 459.

## CHAPTER XIX.

### OF INJUNCTIONS PERTAINING TO CONTRACTS.

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#### I. NATURE AND GROUNDS OF THE JURISDICTION.

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- 1122b. Enjoining breach procured by third person.

§ 1106. **Foundation of the relief; contract must be clear and allegations definite.** While the remedy for past violations of contract is to be sought only in courts of law, the protection of contract rights and the enforcement of specific covenants are matters which are properly cognizable in courts of equity.

The jurisdiction by way of interlocutory injunction to restrain the violation of contracts is based upon the necessity of protecting the legal right, and is exercised for the prevention of irreparable mischief. To warrant a court of equity in interfering, the contract itself must be free from doubt, and the injury apprehended from its violation must be of such a nature as not to be susceptible of adequate compensation in damages at law.<sup>1</sup> And a doubt as to the correctness of the construction of the contract on which the injunction is asked is sufficient ground for refusing to interfere.<sup>2</sup> Nor will an injunction be allowed to restrain the violation of a contract tainted with champerty and maintenance.<sup>3</sup> And if the contract is uncertain and vague in its provisions, or is of an unjust and oppressive character, the relief will be withheld.<sup>4</sup> And the allegations as to the existence, terms and conditions of the contract must be made with distinctness and certainty and must be supported by clear and satisfactory proof.<sup>5</sup>

**§ 1107. Remedy at law bars injunction; illustrations.**

The fact that ample remedy exists at law for the violation of an agreement is always a sufficient objection to the interference of equity.<sup>6</sup> Thus, where a railway has been constructed under a contract whose terms provide for its construction in a particular manner, for the protection of the owners of real estate over which the road passes, the remedy for violation of the agreement is not by enjoining the use of the road until the terms of the contract are complied with, but by an action at law for pecuniary damages, and

<sup>1</sup> *Morris C. & B. Co. v. The Society*, 1 Halst. Ch., 203; *Healy v. Allen*, 38 La. An., 867; *Gas Light & Coke Co. v. City of New Albany*, 139 Ind., 660, 39 N. E., 462.

<sup>2</sup> *Morris C. & B. Co. v. The Society*, 1 Halst. Ch., 203.

<sup>3</sup> *Gregerson v. Imlay*, 4 Blatch., 503.

<sup>4</sup> *Mann v. Stephens*, 15 Sim., 379; *Kimberley v. Jennings*, 6 Sim., 340; *Talbot v. Ford*, 13 Sim., 173.

<sup>5</sup> *Iron Age Publishing Co. v. W. U. T. Co.*, 83 Ala., 498, 3 So., 449.

<sup>6</sup> *Pusey v. Wright*, 31 Pa. St., 387; *Elder v. Shaw*, 12 Nev., 78; *Steinau v. C. G. L. & C. Co.*, 48 Ohio

in such a case equity will not interfere.<sup>7</sup> So equity will not enjoin the assignment or transfer of an attachment bond upon the ground that it was fraudulent and void *ab initio*, since this would constitute a sufficient defense to an action at law upon the bond.<sup>8</sup> And where plaintiff held a license for the use of a patented invention at a certain rate for each machine made and sold, the licensors covenanting to grant no other license at a less rental without a corresponding reduction to plaintiff, and also reserving the right to terminate the license upon a given notice upon the breach of any covenants by the licensee, upon a bill by plaintiff alleging that defendants had granted a license at a less rate, and seeking to enjoin defendants from giving the notice requisite to terminate the license, it was held that no case was presented for an injunction. In such case, the rights of the parties being only legal rights, ample relief might be had without invoking the aid of a court of equity.<sup>9</sup> And where plaintiff has entered into a contract with defendant to take charge of his plantation for a term of years, and to reside thereon and have exclusive control of its management, he can not enjoin defendant from interfering with his possession and control of the premises, since if defendant violates the contract relief may be had in damages.<sup>10</sup> So where defendant, a hotel-keeper, has agreed to use none but plaintiff's hotel registers in his establishment, an injunction will not lie to restrain the breach of such an agreement since the rem-

St., 324, 27 N. E., 545; Gas Light & Coke Co. v. City of New Albany, 139 Ind., 660, 39 N. E., 462; Hair Co. v. Huckins, 5 C. C. A., 522, 56 Fed., 366; Berliner Gramophone Co. v. Seaman, 49 C. C. A., 99, 110 Fed., 30; Florence Sewing Machine Co. v. Singer Manufacturing Co., 8 Blatch., 113; Burdon C. S. R. Co. v. Leverich, 37 Fed., 67.

<sup>7</sup> Pusey v. Wright, 31 Pa. St., 387.

<sup>8</sup> Elder v. Shaw, 12 Nev., 78.

<sup>9</sup> Florence Sewing Machine Co. v. Singer Manufacturing Co., 8 Blatch., 113. But see, *contra*, Florence Sewing Machine Co. v. Grover & Baker S. M. Co., 110 Mass., 1.

<sup>10</sup> Seller v. Fairex, 23 La. An., 397.

edy at law is ample.<sup>11</sup> So where defendant was under contract to use none but plaintiff's gas upon his premises and had covenanted not to use electric lights or oil, an injunction will not be granted to enjoin the use of electric lights in violation of the covenant.<sup>12</sup> So an injunction has been refused which was sought to restrain defendants from suing at law for the breach of a covenant to keep premises insured from fire.<sup>13</sup>

§ 1108. **Fraud a ground for relief.** Fraudulent representations and oppressive conduct in obtaining an agreement or contract frequently afford ground for relief in equity to prevent its enforcement at law against the contracting party on whom the fraud was exercised. Thus, a perpetual injunction has been granted against proceedings at law to recover an annuity upon a contract entered into on the strength of mistaken and false representations as to the value of certain property.<sup>14</sup> And an injunction to prevent the sale of mortgaged premises has been made perpetual upon proof that through the influence of the mortgagee the mortgagor had, by habitual drunkenness, become reduced to a condition of imbecility bordering on insanity, the mortgagee being unable to show any valid consideration for the contract.<sup>15</sup> So an injunction may be granted to prevent an improper diversion of a specific fund, out of which, by agreement between the parties upon sufficient consideration, payment is to be made for certain stock subscribed.<sup>16</sup> So an injunction has been granted to restrain an action upon a contract which was delivered in violation of an agreement

<sup>11</sup> *Hair Co. v. Huckins*, 5 C. C. of the charter party, see *De Mat-*  
A., 522, 56 Fed., 366. *tos v. Gibson*, 4 DeGex & J., 276.

<sup>12</sup> *Steinau v. C. G. L. & C. Co.*, <sup>14</sup> *Dale v. Roosevelt*, 5 Johns. .  
48 Ohio St., 324, 27 N. E., 545. Ch., 174.

<sup>13</sup> *White v. Warner*, 2 Meriv., <sup>15</sup> *Van Horn v. Keenan*, 28 Ill.,  
459. As to the right to an injunc- 445.

tion to prevent the violation of a <sup>16</sup> *Ashe v. Johnson's Adm'r*, 2  
charter party upon a vessel, as Jones Eq., 149.  
against a mortgagee with notice

that it should be held in escrow until certain changes were made.<sup>17</sup> And one who discovers or invents a process of manufacture which he does not disclose to the public, has such a property therein, regardless of whether the process is patentable, as will be protected in equity by enjoining one who, in violation of his contract and in breach of confidence, undertakes to apply the process to his own use or that of third persons.<sup>18</sup>

§ 1109. **Specific performance.** It has frequently been held that the contract concerning which the injunction is sought must be of such a nature as to be susceptible of specific enforcement by decree, and that if the bill itself on which the injunction is sought fails to show such a contract, or if it appears that the contract is not of such a nature, the injunction, which is intended in aid of the general relief sought, will not be allowed.<sup>19</sup> In accordance with this doctrine, it is held not to be sufficient that the legal right under the contract and its violation are clearly made out, since, if

<sup>17</sup> Wyckoff v. Victor S. M. Co., 43 Mich., 309, 5 N. W., 405.

<sup>18</sup> Peabody v. Norfolk, 98 Mass., 452; Thum Co. v. Tloczynski, 114 Mich., 149, 72 N. W., 140, 38 L. R. A., 200, 68 Am. St. Rep., 469; Westervelt v. National Paper Co., 154 Ind., 673, 57 N. E., 552. In Peabody v. Norfolk, *supra*, complainant had built a mill and furnished it with machinery invented by himself for manufacturing cloth by a secret process. An engineer in his employ, who had contracted not to give information concerning the machinery, but to preserve the process a secret, was enjoined from violating his contract.

<sup>19</sup> Canton Co. v. Northern R. R., 21 Md., 383; Fothergill v. Row-

land, L. R. 17 Eq., 132; Marble Co. v. Ripley, 10 Wall., 339; Texas & P. R. Co. v. Marshall, 136 U. S., 393, 10 Sup. Ct. Rep., 846; Peacock v. Deweese, 73 Ga., 570; Welty v. Jacobs, 171 Ill., 624, 49 N. E., 723, 40 L. R. A., 98; Iron Age Publishing Co. v. W. U. T. Co., 83 Ala., 498, 3 So., 449; Berliner Gramophone Co. v. Seaman, 49 C. C. A., 99, 110 Fed., 30. And see Equitable Co. v. Baltimore Co., 63 Md., 285; Railroad Co. v. Telegraph Co., 38 Ohio St., 24; Jones v. Williams, 139 Mo., 1, 39 S. W., 486, 40 S. W., 353, 37 L. R. A., 682, 61 Am. St. Rep., 436; Chicago Ry. Co. v. Calumet Ry. Co., 171 Ill., 391, 49 N. E., 576; Steinau v. C. G. L. & C. Co., 48 Ohio St., 324, 27 N. E., 545.



the agreement is of such a nature that a court of equity can not enforce specific performance of its terms, or if the injury is one for which ample redress may be had at law, equity will not interfere.<sup>20</sup> So in the case of a contract for the sale and delivery of all the coal from defendant's colliery for a given period and a fixed price, the contract being of such a nature that equity can not specifically enforce it, it will not interfere by injunction to prevent its violation, but will leave the party aggrieved to his remedy at law.<sup>21</sup> So upon a bill for the specific performance of an agreement to convey certain mining interests in lands, equity will not grant an injunction in aid of the action when the contract is unilateral, defendant having merely an option to purchase, but being under no obligation so to do, the case, therefore, not being such as to warrant a decree for specific performance.<sup>22</sup> The doctrine as above stated is, however, by no means inflexible, and if the case presented is such that the negative remedy by injunction will do substantial justice between the parties by obliging defendant, either to carry out his contract, or to lose all benefit of the breach, and if the legal remedy is inadequate and no reason of policy is shown to the contrary, equity may restrain the violation of a contract, although unable to specifically enforce it.<sup>23</sup>

§ 1109 *a*. **Mutuality.** Upon the same principles as those which govern courts of equity in decreeing the specific enforcement of contracts generally, it has frequently been held

<sup>20</sup> *Collins v. Plumb*, 16 Ves., 454; affirming S. C., 5 DeG. & Sm., 485, *Munroe v. Wivenhoe R. Co.*, 11 Jur. N. S., 613.

<sup>21</sup> *Fothergill v. Rowland*, L. R. 17 Eq., 132.

<sup>22</sup> *Peacock v. Deweese*, 73 Ga., 570.

<sup>23</sup> *Singer Manufacturing Co. v. Union Co.*, 6 Fish., 480; S. C., 1 Holmes, 253. See also *Lumley v. Wagner*, 1 DeGex, M. & G., 604, affirming S. C., 5 DeG. & Sm., 485, and overruling *Kemble v. Kean*, 6 Sim., 333; *Kimberley v. Jennings*, 6 Sim., 340. And in *Southern Cal. ky. Co. v. Rutherford*, 62 Fed., 796, the court granted an injunction restraining the employees of a railway company from refusing to perform their regular and customary duties so long as they remained in complainant's employ.

that injunctive relief will not be granted against the violation of a contract in which the element of mutuality is wanting. Where, therefore, the obligation imposed by the contract upon the plaintiff is of such a nature that a court could not specifically enforce it against him at the instance of the defendant, such want of mutuality affords sufficient ground for denying equitable relief to the plaintiff against a violation of the contract by the defendant.<sup>24</sup> So where the contract is terminable at the option of the plaintiff, relief will be denied because of the want of mutuality.<sup>25</sup>

§ 1110. **Injunctions against actions on contract.** Equity may interfere by injunction to restrain an action at law upon a contract, such as a lease, when such relief is necessary to prevent the instrument being used contrary to its expressed intention, and when its enforcement would be against conscience.<sup>26</sup> And in an action brought to procure the correction of an alleged mistake in a contract, an injunction has been allowed to prevent a forfeiture upon the contract and the bringing suit thereon, upon plaintiff paying into court,

<sup>24</sup> *Strang v. Richmond*, P. & C. R. Co., 41 C. C. A., 474, 101 Fed., 511; *Welty v. Jacobs*, 171 Ill., 624, 49 N. E., 723, 40 L. R. A., 98; *Richmond v. Dubuque & S. C. R. Co.*, 33 Iowa, 422; *Iron Age Publishing Co. v. W. U. T. Co.*, 83 Ala., 498, 3 So., 449; *Hills v. Crowl*, 1 DeGex, M. & G., 626; *dictum* in *Steinau v. C. G. L. & C. Co.*, 48 Ohio St., 324, 27 N. E., 545. See, further, upon the question of mutuality *Philadelphia Ball Club v. Lajoie*, 202 Pa. St., 210, 51 Atl., 973, 58 L. R. A., 227, 90 Am. St. Rep., 627, the court holding that the element of mutuality was not wanting. And see *Jones v. Williams*, 139 Mo., 1,

39 S. W., 486, 40 S. W., 353, 37 L. R. A., 682, 61 Am. St. Rep., 436; *Pingle v. Conner*, 66 Mich., 187, 33 N. W., 385. In the latter case, owing to the very peculiar nature of the contract and the relation of the parties, the court held that it would be inequitable and unjust to enjoin a violation of the contract and the relief was accordingly denied and the plaintiff left to his remedy at law.

<sup>25</sup> *Philadelphia Ball Club v. Hallman*, 8 Pa. Co. Ct., 57; *Harrisburg Ball Club v. Athletic Association*, 8 Pa. Co. Ct., 337.

<sup>26</sup> *Reade v. Armstrong*, Drury t. Napier, 55; S. C., 7 Ir. Ch., 375, affirming S. C., *ib.*, 266.

during the pendency of the action, all sums of money due from him under the agreement.<sup>27</sup>

§ 1111. **Railway-operating contracts.** It is also held that where a railway company is in possession of the line of another company, operating it under a joint contract between the two companies, it may be enjoined from violating the agreement by diverting traffic from plaintiff's line which, by the terms of the agreement, it is bound to carry over plaintiff's road.<sup>28</sup> But where a railway company had agreed with certain contractors that they should work its line and keep its rolling stock and material in repair for a given time at a specified compensation, with a provision for terminating the contract, upon notice by the company, for a failure on the part of the contractors to comply with such notice, it was regarded as a contract of such a nature that equity would not interfere by injunction to restrain the railway company from determining it and resuming possession of the line.<sup>29</sup>

§ 1112. **Contract of agency.** A court of equity will not interfere by injunction for the purpose of compelling defendant to retain the plaintiff in his employ in the capacity of an agent, in accordance with the terms of a contract or agreement for such employment. And it affords sufficient ground for refusing the relief in such a case, that the duties of an agent are in the nature of personal services, and as such are incapable of being enforced in equity.<sup>30</sup>

§ 1113. **Assignee of contract protected.** The jurisdiction of equity for the protection and enforcement of contract rights is not limited to the original parties to the agreement, but may be exercised in favor of their assignees, and may

<sup>27</sup> *Humphreys v. Hurtt*, 3 Hun, 216; S. C., 5 Thomp. & C., 433.

<sup>29</sup> *Johnson v. Shrewsbury & B. R. Co.*, 3 DeGex, M. & G., 914.

<sup>28</sup> *Wolverhampton & W. R. Co. v. London & N. W. R. Co.*, L. R. 16 Eq., 433.

<sup>30</sup> *Mair v. Himalaya Tea Co.*, L. R. 1 Eq., 411.

be invoked in their behalf in aid of proceedings at law. And where one has parted with his equitable interest in a contract not assignable at law, he may be restrained from interfering with or preventing the use of his name by the assignee in enforcing the contract by action at law, or from attempting to dismiss the action.<sup>31</sup>

§ 1114. **Conveyance for church purposes; subscription to educational institution.** Where real estate is conveyed to the trustees of a religious association to be used as a place of worship, in accordance with the doctrines and forms of a particular church, the contract may be protected in equity by restraining its violation. And if ministers of a different faith, who are not recognized by the church prescribed as the standard, are permitted to officiate in the church, there is such a departure from the trust created by the original contract as to warrant a court of equity in interfering.<sup>32</sup> And persons who have contributed to a fund raised by subscription, on condition that an educational institution should be permanently located at a specified place, are entitled to the aid of equity to restrain its removal from such place. The jurisdiction in such case is exercised upon the ground that the acceptance of the conditions constitutes a contract, the attempted violation of which may be enjoined.<sup>33</sup>

§ 1115. **Gaming contract.** In the case of a contract void for want of sufficient consideration, as a note or bond given for money lost at gaming, the defense being one of a purely legal nature, equity will not interfere to restrain the enforcement of a judgment, where no defense was interposed to the action at law and no excuse is offered for having failed to defend.<sup>34</sup> If, however, defendant is prevented by

<sup>31</sup> Deaver v. Eller, 7 Ired. Eq., Hare, 572. For further illustrations of the same principle, see 24. See Horsky v. Helena C. W. Co., 13 Mont., 229, 33 Pac., 689 Chapter V, ante.  
for an injunction against the assignee of a contract.

<sup>33</sup> Hascall v. Madison University, 8 Barb., 174.

<sup>32</sup> Attorney-General v. Welsh, 4

<sup>34</sup> Giddens v. Lea, 3 Humph.,

surprise from asserting his defense to an action upon a gaming contract, he will not be debarred from relief in equity, even though he made no effort to obtain a new trial in the action at law.<sup>35</sup> If it is doubtful whether the contract on which a judgment has been obtained was given for a gaming consideration, and is therefore void, and if there is also doubt as to whether the judgment creditor to whom the debt was transferred took it under the belief that the consideration was lawful, a preliminary injunction granted against the judgment may be retained until the facts can be determined.<sup>36</sup> But it has been held, under a statute prohibiting gaming, that a judgment founded upon a gaming contract may be enjoined, although the contract has been assigned to an innocent holder, ignorant of its origin, and although no defense was interposed at law.<sup>37</sup>

§ 1116. **Usurious contracts.** Proceedings at law for the enforcement of usurious contracts will, as a general rule, be enjoined only upon condition that the party aggrieved make actual payment or tender of the amount really due.<sup>38</sup> But if defendant answers without availing himself of this objection, an injunction already granted will not be dissolved where complainant offers to pay the amount actually due.<sup>39</sup> But where an injunction is allowed to prevent a sale of land under a trust deed, until the question of usury can be determined, and a verdict at law determines that the contract was usurious, the injunction should not be perpetuated for the entire amount, but only for that portion which is usur-

133; *Jones v. Jones*, N. C. Term R., 110.

<sup>35</sup> *White v. Washington's Ex'r*, 5 Grat., 645.

<sup>36</sup> *Nelson's Adm'r v. Armstrong*, 5 Grat., 354.

<sup>37</sup> *Woodson v. Barrett*, 2 Hen. & M., 80. And see *Skipwith v. Strother*, 3 Rand., 214.

<sup>38</sup> *Morgan v. Schermerhorn*, 1

Paige, 544; *Miller v. Ford*, Saxt., 358; *Rogers v. Rathbun*, 1 Johns. Ch., 367; *Tupper v. Powell*, Ib., 439; *Fanning v. Dunham*, 5 Johns. Ch., 122; *Turpin v. Povall*, 8 Leigh, 93. But see *Wilhelmson v. Bentley*, 25 Neb., 473, 41 N. W., 387.

<sup>39</sup> *Morgan v. Schermerhorn*, 1 Paige, 544.

ious.<sup>40</sup> While an injunction may properly be allowed against the sale of real estate under a deed of trust to secure a contract alleged to be usurious, until the question of usury can be determined, or until the lender can establish the validity of his contract at law, on the ground that the proceedings being *in pais*, the borrower is without his day in court, yet if the usurious contract embraces likewise a pre-existing, valid debt, unaffected by the usurious debt, or by being coupled therewith, a different rule applies, and proceedings to enforce the debt secured by the deed of trust will not be restrained for the purpose of compelling the obligee in the bond to establish his claim at law.<sup>41</sup> And it is to be observed that in those cases where preliminary injunctions are granted to restrain the enforcement of deeds of trust, on the ground that the contract to secure which they were given was usurious, the relief is continued only until the question of usury can be determined. If, therefore, the validity of the contract is fully established, the injunction will be dissolved; otherwise it may be made perpetual.<sup>42</sup>

§ 1117. **The same.** While, as we have thus seen, equity may under some circumstances interfere to prevent the enforcement of contracts tainted with usury, yet if the cause has been submitted to a legal forum and there decided, a court of equity will not afford relief against the judgment, in the absence of any special circumstances of fraud, or complicated and embarrassing facts connected with the transactions alleged to be usurious. In all such cases it is a sufficient objection to the exercise of the jurisdiction that the usury, if any, might have been urged as a defense to the action at law, and defendant having neglected to avail himself of the opportunity of defending in the legal forum, is

<sup>40</sup> Bell *v.* Calhoun, 8 Grat., 22.

<sup>42</sup> Marks *v.* Morris, 2 Munf., 407;

<sup>41</sup> Marks *v.* Morris, 2 Munf., 407;  
Bank of Washington *v.* Arthur, 3  
Grat., 173.

Martin *v.* Lindsay's Adm'rs, 1  
Leigh, 499; Fitzhugh *v.* Gordon, 2  
Leigh, 626.

debarred from relief in equity.<sup>43</sup> If, however, the remedy at law is surrounded with embarrassment and difficulty, the transaction involving a large number of usurious securities, and being exceedingly complex in its nature in consequence of the devices resorted to for the purpose of concealing the usury, a court of equity may properly extend its aid by injunction.<sup>44</sup>

§ 1118. **Injunction against contract pendente lite.** Although equity has undoubted jurisdiction to restrain parties from entering into such contracts, pending litigation, as may embarrass plaintiff in his action at law, yet this jurisdiction is to be exercised in the sound discretion of the court, after weighing the relative convenience and inconvenience likely to result to the parties. And where it is apparent that the injury which would result to the plaintiff by refusing the injunction, as compared with that which defendant would sustain by granting the relief, is extremely small, the relief will be withheld.<sup>45</sup>

<sup>43</sup> *Lindsley v. James*, 3 Cold., 477; *Morgan v. England*, Wright (Ohio), 112; *Lansing v. Eddy*, 1 Johns. Ch., 49; *Buchanan v. Nolin*, 3 Humph., 63; *McKoin v. Cooley*, Ib., 559.

<sup>44</sup> *Frierson v. Moody*, 3 Humph., 561.

<sup>45</sup> *Shrewsbury & C. R. Co. v. Shrewsbury & B. R. Co.*, 1 Sim. N. S., 410. The following observations of the Vice Chancellor in this case clearly present the grounds on which relief is refused: " \* \* \* Although I am perfectly satisfied of the authority of this court to issue an injunction, not merely to restrain parties from doing acts, but also from entering into contracts pending litigation that may embarrass the plaintiff

in his suit, and that the court is entitled to do so whenever it sees there is a fair ground for litigation raised by the plaintiff, yet that right of the court must be guided by a discretion not to exercise it where it sees that on the balance of convenience and inconvenience between *interim* interference and *non interim* interference, the balance greatly preponderates in favor of the defendant and against the plaintiff. Now, here, the injury to the plaintiffs, in comparison with the injury to the defendants, is extremely small. \* \* \* And, on the whole, if the convenience and the inconvenience are weighed against each other, the inconvenience seems to me to preponderate, beyond all measure, in favor of

§ 1119. **Plaintiff must come into court with clean hands; diligence required; no relief where contract illegal.** He who seeks the aid of equity to enjoin the violation of an agreement, or for the protection of his contract rights, must himself come into court with clean hands, and to entitle himself to relief he must have carried out, so far as possible, his own part of the contract.<sup>46</sup> So, too, he must show that he has used reasonable diligence in asserting his rights and in demanding their protection, and unreasonable delay in seeking the aid of a court of equity, or acquiescence in the violation of the agreement in question, will generally prove a bar to the exercise of the jurisdiction.<sup>47</sup> Nor will a court of equity interfere to compel the giving up of a contract made for a fraudulent purpose, or to restrain an action at law upon it, when plaintiff himself, the obligor in the contract, was a participant in the fraud.<sup>48</sup> And where defendant sells his business to plaintiffs, agreeing to carry it on as superintendent under their direction, plaintiffs can not enjoin defendant from a violation of his part of the agreement when they themselves have been guilty of a deliberate violation of its terms.<sup>49</sup> Nor will equity interfere to enjoin the breach of a contract which is illegal and void as against public policy.<sup>50</sup>

§ 1120. **Injunction in aid of specific performance.** To warrant a court of equity in granting an injunction in aid of

the party who has the legal right to enter into any legal contract he pleases. That is the short ground on which I feel myself bound to refuse the injunction."

<sup>46</sup> *Stiff v. Cassell*, 2 Jur. N. S., 348; *Fechter v. Montgomery*, 33 Beav., 22; *Healy v. Allen*, 38 La. An., 867.

<sup>47</sup> *Powell v. Allarton*, 4 L. J. Ch. N. S., 91; *Maythorne v. Palmer*, 11 Jur. N. S., 230; *Roper v. Wil-*

*liams*, 1 Turn. & R., 18; *Ocean City Assn. v. Schurch*, 57 N. J. Eq., 268, 41 Atl., 914; *East St. Louis R. Co. v. City of East St. Louis*, 182 Ill., 433, 55 N. E., 533.

<sup>48</sup> *Hamilton v. Ball*, 2 Ir. Eq., 191.

<sup>49</sup> *Telegraph Co. v. McLean*, L. R. 8 Ch., 658.

<sup>50</sup> *South Chicago Ry. Co. v. Calumet Ry. Co.*, 171 Ill., 391, 49 N. E., 576.



the specific performance of a contract, when the injury apprehended is not susceptible of compensation in damages, it will usually suffice if complainant establishes a *prima facie* case entitling him to specific performance, and it is not necessary that it should conclusively appear that he will maintain his case upon the final hearing.<sup>51</sup> And an injunction to restrain the sale of real estate is proper in aid of a bill to enforce the specific performance of a contract for its conveyance.<sup>52</sup> It is to be observed, however, that an injunction in aid of specific performance, being merely ancillary to the main purpose of the bill, is dependent upon that and must stand or fall with the bill. And where it appears that the contract which it is sought to enforce specifically is not concluded or certain in all its parts, so as to be properly enforced, the injunction will be dissolved for want of equity in the bill.<sup>53</sup> So, too, if there are disputes concerning the rights of the parties under the contract, such disputes involving the very terms and obligation of the contract itself, an injunction will be withheld until the rights of the parties are ascertained and adjusted.<sup>54</sup> And if, upon the case as made out by the bill, complainant is not entitled to a specific performance, he can not have an injunction, which is merely ancillary to the principal object of the suit.<sup>55</sup> Thus, where plaintiffs were employed by a railway company as contractors to build a part of its road, to be paid in shares and debentures of the company, upon a bill by plaintiffs for specific performance, the court being of opinion that it could not enforce the contract upon the part of plaintiffs refused

<sup>51</sup> Powell v. Lloyd, 1 Y. & J., 427; Attwood v. Barham, 2 Russ., 186; Crosbie v. Tooke, 1 Myl. & K., 433; Chambers v. Alabama I. Co., 67 Ala., 353.

<sup>52</sup> Curtis v. Marquis of Buckingham, 3 Ves. & B., 168.

<sup>53</sup> McKibbin v. Brown, 1 McCart., 13.

<sup>54</sup> Brown's Appeal, 62 Pa. St., 17. See also Domestic Telegraph Co. v. Metropolitan Telephone Co., 39 N. J. Eq., 160.

<sup>55</sup> Allen v. Burke, 2 Md. Ch., 534; Peto v. Brighton R. Co., 1 Hem. & M., 468.

to enjoin defendant from transferring the shares to others, leaving the parties to their remedy at law.<sup>56</sup> So when the agreement in question is for the performance of an affirmative act, and from the nature of the contract the court is unable to enforce its specific performance, it will not grant an injunction against a breach of the undertaking, such relief being merely ancillary to the principal relief sought by the action.<sup>57</sup>

§ 1121. **The same.** Upon similar principles, it is held that an injunction will not be granted in aid of an action for specific performance, when the agreement which it is sought to enforce is so uncertain in its terms as not to be the subject of a decree for specific performance.<sup>58</sup> So when there has been such a departure from the original agreement that the court will not decree its performance, an injunction sought in aid of specific performance will not be allowed.<sup>59</sup> And in an action by a purchaser to procure the specific performance of a contract for the purchase of leasehold property, in which it is sought to restrain the vendor from reselling the property, the court will weigh the considerations of relative convenience and inconvenience to the respective parties; and if the inconvenience to plaintiff from refusing appears less than that to defendant from granting the injunction, it will not be allowed in a doubtful case, and when defendants appear likely to succeed in the litigation in the end.<sup>60</sup>

§ 1122. **The same as to chattels.** Where plaintiff seeks the specific performance of a contract for the sale of a chattel, and, upon the case presented, he is plainly entitled to the relief sought, he may have the aid of an injunction to pre-

<sup>56</sup> *Peto v. Brighton R. Co.*, 1 Hem. & M., 468.

<sup>57</sup> *Baldwin v. Society*, 9 Sim., 393.

<sup>58</sup> *South Yorkshire R. Co. v. Great Northern R. Co.*, 1 Sm. & Gif., 324.

<sup>59</sup> *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Sm. & Gif., 119.

<sup>60</sup> *Hadley v. Bank of Scotland*, 3 DeGex, J. & S., 63.

vent the removal of the chattel beyond the jurisdiction of the court.<sup>61</sup> So where the contract is to furnish to plaintiff a chattel of a special and peculiar value, which is indispensable to his business and which can not be obtained elsewhere in that vicinity, so that damages at law would afford an inadequate remedy, the contract may be enforced specifically and an injunction may be allowed to prevent the defendant from otherwise disposing of the subject-matter of the contract, although the restriction against otherwise disposing of it may be inferred only from the positive terms of the agreement.<sup>62</sup>

§ 1122 *a*. **Contract to furnish water, gas and electric lights.** Where defendant, such as a water company or municipal corporation, is under obligation to furnish water to the plaintiff, an injunction is the appropriate remedy to prevent a violation of such a contract resulting from the unauthorized turning off of the water.<sup>63</sup> So equity will interfere on behalf of a tenant to restrain the wrongful turning off of water by the landlord.<sup>64</sup> In such cases the relief is granted on account of the inadequacy of the legal remedy and the difficulty of accurately estimating the damages in an action at law, and it is not necessary that the injury itself should appear to be irreparable or the defendant insolvent.<sup>65</sup> And if the wrong has already been committed, it is proper to grant a mandatory injunction compelling defendant to turn on the water.<sup>66</sup> Upon similar grounds, an injunction is properly

<sup>61</sup> *Hart v. Herwig*, L. R. 8 Ch., 860.

<sup>62</sup> *Equitable Co. v. Baltimore Co.*, 63 Md., 285.

<sup>63</sup> *Brown v. City of Frankfort*, 9 S. W., 384, (Ct. of Apps., Ky., 1888); *Horsky v. Helena C. W. Co.*, 13 Mont., 229, 33 Pac., 689; *Edwards v. Milledgeville W. Co.*, 116 Ga., 201, 42 S. E., 417; *Sedalia Brewing Co. v. Sedalia W. W. Co.*, 34 Mo. App., 49.

<sup>64</sup> *Brauns v. Glesige*, 130 Ind., 167, 29 N. E., 1061.

<sup>65</sup> *Brown v. City of Frankfort*, 9 S. W., 384, (Ct. of Apps., Ky., 1888); *Sedalia Brewing Co. v. Sedalia W. W. Co.*, 34 Mo. App., 49; *Edwards v. Milledgeville W. Co.*, 116 Ga., 201, 42 S. E., 417.

<sup>66</sup> *Brauns v. Glesige*, 130 Ind., 167, 29 N. E., 1061; *Sedalia Brewing Co. v. Sedalia W. W. Co.*, 34 Mo. App., 49.

granted to restrain a gas company from turning off plaintiff's supply of gas in violation of its contract to furnish it.<sup>67</sup> So a preliminary injunction will be allowed to restrain an electric lighting company from violating its contract to furnish lights by shutting off the supply.<sup>68</sup>

§ 1122 *b*. **Enjoining breach procured by third person.** A court of equity may, under some circumstances, enjoin third persons, not parties to a contract, from procuring a breach of the agreement by one who is a party to it. Thus, where a manufacturer had a large number of apprentices in his employ, all of whom were under contract with him not to join any labor unions while remaining in his employ, an injunction was allowed to restrain defendants who were officers and agents of a labor union and who had no connection with plaintiff's business from enticing away the apprentices and persuading them to join the union in violation of their covenant with the plaintiff, it appearing that such conduct, if persisted in, would result in great and irreparable injury to the plaintiff's business for which there could be no redress in a court of law.<sup>69</sup> So where the owner of a business which he had sold out to plaintiff had covenanted not to re-engage in the same trade, an injunction was granted to restrain defendants, who were not parties to the contract or in any way connected with it, from procuring the covenantor to violate his agreement, where it appeared that the defendants were themselves engaged in the same business in competition with the plaintiff and were guilty of a species of unfair competition in thus injuring the good-will of plaintiff's business.<sup>70</sup>

<sup>67</sup> *Gallagher v. Equitable Gas-Metropolitan Club*, 6 App. D. C.,  
light Co., 141 Cal., 699, 75 Pac., 536.

329; *Whiteman v. Fayette Fuel*      <sup>69</sup> *Flaccus v. Smith*, 199 Pa. St.,  
Gas Co., 139 Pa. St., 492, 20 Atl., 128, 48 Atl., 894, 54 L. R. A., 640,  
1062; *Xenia Real-Estate Co. v.* 85 Am. St. Rep., 779.

*Macy*, 147 Ind., 568, 47 N. E., 147;      <sup>70</sup> *Fleckenstein Bros. Co. v.*  
*Sickles v. Manhattan G. L. Co.*, 64 *Fleckenstein*, (N. J., 1904) 57  
How. Pr., 33.      Atl., 1025.

<sup>68</sup> *United States E. L. Co. v.*

## II. PROMISSORY NOTES.

- § 1123. Fraud or duress a ground for relief.
- 1124. Violations of trust; parties.
- 1125. Effect of injunction restraining payment of note.
- 1126. Fraud; undue influence; threats.
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- 1130. Plaintiff must do equity.
- 1131. Accommodation paper.
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- 1133. Effect of injunction; statute of limitations; interest.

§ 1123. **Fraud or duress a ground for relief.** The aid of equity is sometimes invoked to restrain the collection of commercial paper, when its enforcement would be inequitable and against conscience. And it may be asserted as a rule that where promissory notes have been obtained by fraud or duress, or by undue influence and without adequate consideration, an injunction may properly be granted to restrain their collection or negotiation, if in the hands of the payee.<sup>1</sup> Thus, where complainant has been induced to give his notes and a mortgage, upon threats of a prosecution for perjury, which threats were utterly groundless, the collection of the securities will be restrained.<sup>2</sup> So where plaintiff was induced to give his promissory note to avoid a threatened prosecution for perjury of which he was not guilty and he subsequently took up such note by giving his check therefor, an injunction was granted against the assignment and transfer of the check.<sup>3</sup> So undue influence exercised upon the maker of a note, who was a person of weak mind and con-

<sup>1</sup> Sackett v. Hillhouse, 5 Day, Eugene Glass Co., 156 Ill., 397, 551; Darst v. Brockway, 11 Ohio, 40 N. E., 971; Lyster v. Stickney, 462; James v. Roberts, 18 Ohio, 12 Fed., 609.

548; Rembert v. Brown, 17 Ala., 2 James v. Roberts, 18 Ohio, 548.  
667; Robinson v. Jefferson, 1 Del. 3 Moeckly v. Gorton, 78 Iowa,

Ch., 244; Hullhorst v. Scharner, 15 202, 42 N. W., 648.

Neb., 57, 17 N. W., 259; Hodson v.

stantly given to intoxication, has been deemed sufficient ground for enjoining a suit upon the note.<sup>4</sup> So, too, fraudulent representations in the sale of a patent right, and the failure of the patent which constituted the original consideration for which the notes were given, have been held sufficient to warrant an injunction against their collection.<sup>5</sup> And an injunction has been allowed to restrain the collection of notes procured by the payee through fraud and imposition, and upon his agreement to convey as a consideration for the notes an interest in letters patent, which he has failed to do.<sup>6</sup> And where a bill is filed against the holder of a note secured by a mortgage for the purpose of cancelling the note and mortgage upon the ground of fraud, it is proper to enjoin the collection and transfer of the note and the foreclosure of the mortgage as ancillary to the principal relief sought.<sup>7</sup> And it has been held that the maker of a promissory note may enjoin its negotiation upon the ground that it was never delivered.<sup>8</sup>

§ 1124. **Violations of trust; parties.** Where one has received commercial paper which has been entrusted to him for a special use or purpose, and, in breach of the trust reposed in him, he attempts to convert the paper to a different use, he may be enjoined from any act, such as carrying on a suit at law, which may be the means or instrument of a violation of the trust. And the assignees of such note, taking it under circumstances sufficient to apprise them of the fraud or breach of trust, may be enjoined from proceedings at law for its enforcement.<sup>9</sup> But if a note has passed into the hands of a *bona fide* holder for valuable consideration, proceedings at law for its collection will not be restrained

<sup>4</sup> Rembert v. Brown, 17 Ala., 667.

<sup>7</sup> Hodson v. Eugene Glass Co.,

<sup>5</sup> Sackett v. Hillhouse, 5 Day, 551; Darst v. Brockway, 11 Ohio, 462.

156 Ill., 397, 40 N. E., 971.

<sup>8</sup> Streissguth v. Kroll, 86 Minn., 325, 90 N. W., 577.

<sup>6</sup> Robinson v. Jefferson, 1 Del. Ch., 244.

<sup>9</sup> Atlantic Delaine Co. v. Tre-dick, 5 R. I., 171.

on the ground of fraudulent representations by the payee to the maker.<sup>10</sup> Nor will the fact that a payment was made upon the note while in the hands of the payee, who assigned it without indorsing the payment, warrant an injunction to restrain proceedings under a judgment recovered by the assignee of the note.<sup>11</sup>

§ 1125. **Effect of injunction restraining payment of note.** As regards the effect of a temporary injunction restraining the payment of a note, where the makers and guarantor have been enjoined from making payment, it is held that the writ constitutes no bar to the recovery of a judgment upon the note itself.<sup>12</sup> But in no event should parties be enjoined from the payment of notes who are not made defendants in the bill, and an injunction granted against such persons will be dissolved because of the non-joinder.<sup>13</sup>

§ 1126. **Fraud; undue influence; threats.** The negotiation of commercial paper may be enjoined when it was obtained through fraudulent or improper conduct rendering it against conscience to enforce it, and when there is danger of its passing into the hands of innocent purchasers for valuable consideration and without notice, whereby the maker would be cut off from asserting his defense at law.<sup>14</sup> And undue influence used in obtaining a note will warrant the court in enjoining its collection. Thus, in the case of a young woman who had just attained her majority, and who was induced through the representations of her relatives, with whom she lived and by whom she was largely controlled, to give a promissory note, without consideration and in ignorance of its terms, an injunction was allowed against

<sup>10</sup> *Dougherty v. Scudder*, 2 C. E. Green, 248.

<sup>11</sup> *Cummins v. Bentley*, 5 Ark., 9.

<sup>12</sup> *Campbell v. Gilman*, 26 Ill., 120.

<sup>13</sup> *Fellows v. Fellows*, 4 Johns. Ch., 25.

<sup>14</sup> *Hood v. Aston*, 1 Russ., 412; *Sharp v. Arbuthnot*, 13 Jur., 219;

*Green v. Pledger*, 3 Hare, 165;

*Thurman v. Burt*, 53 Ill., 129;

*Wilcox v. Ryals*, 110 Ga., 287, 34

S. E., 575; *Dickenson v. B. L. &*

*I. Co.*, 93 Va., 498, 25 S. E., 548.

the enforcement of judgment upon the note.<sup>15</sup> So where notes have been inequitably and unjustly extorted from complainant by force of judicial process, issued contrary to an express agreement, and such notes are without consideration in fact or in law, the payee may be enjoined from putting them in circulation by assignment or otherwise.<sup>16</sup>

§ 1127. **Marriage brokage; foreign court; gaming.** In an early English case, upon a bill to enjoin the bringing of an action upon a promissory note given for the consideration of marriage brokage, Lord Hardwicke enjoined defendant from assigning or indorsing the note to any person, but refused to extend the injunction so far as to prevent him from proceeding at law.<sup>17</sup> So an injunction was allowed to restrain suits upon bills of exchange which had been declared void by the judgment of a foreign court having jurisdiction over the matter.<sup>18</sup> And an interlocutory injunction has been granted to restrain the negotiation of negotiable paper given for money lost at gaming.<sup>19</sup>

§ 1128. **Set-off and insolvency.** The question of insolvency is sometimes a controlling question in the class of cases under consideration, and an injunction may properly be al-

<sup>15</sup> *Espey v. Lake*, 10 Hare, 260. "I take it to be quite clear," says the Vice Chancellor, "that the principles of this court go to this extent—that, in the case of a security taken from a person just of age, living under the influence and in the house of another person, with a relationship subsisting between such other person and the person from whom the security is taken, which constitutes anything in the nature of a trust or anything approaching to the relation of guardian and ward, or of standing in *loco parentis* to the surety, this court will not allow such se-

curity to be enforced against the person from whom it is taken, unless the court shall be perfectly satisfied that the security was given freely and voluntarily, and without any influence having been exercised by the party in whose favor the security is made, or by the party who was the medium or instrument of obtaining it."

<sup>16</sup> *Thurman v. Burt*, 53 Ill., 129.

<sup>17</sup> *Smith v. Aykwell*, 3 Atk., 566.

<sup>18</sup> *Burrows v. Jamereau*, Dick., 48.

<sup>19</sup> *Lloyd v. Gurdon*, 2 Swanst., 180.



lowed to prevent the negotiation and collection of promissory notes for the purpose of establishing a set-off between the parties when defendants are insolvent. Thus, where plaintiffs and defendants are mutually indebted each to the other upon certain promissory notes, but defendants have become insolvent and have stopped payment, they may be enjoined from negotiating or transferring plaintiffs' notes held by them, since it would be inequitable and unjust to permit defendants to dispose of plaintiffs' notes, leaving their indebtedness to plaintiffs unpaid.<sup>20</sup> So equity has jurisdiction to restrain the negotiation of promissory notes given for the purchase price of articles of personal property, upon the ground of fraudulent representations as to title or quality, where both parties did not have the same means of information, and where the vendor has become insolvent.<sup>21</sup> And where a promissory note secured by a chattel mortgage is given to one as trustee for another, and the real owner becomes insolvent, the maker may maintain a bill for an injunction to restrain the payee from transferring the note before maturity and from foreclosing the mortgage, upon the ground of failure of consideration in the original transaction.<sup>22</sup>

§ 1129. **Failure of consideration; defense at law; purchase of vessel.** But the failure of the consideration upon which a note was given does not of itself constitute sufficient ground for enjoining the prosecution of an action thereon, when such matter would furnish a clear defense in a court of law, in which the question could be tried more satisfactorily than in a court of equity.<sup>23</sup> Nor will equity interfere to enjoin the transfer of a promissory note which is past due, and as to which the maker has a perfect defense at

<sup>20</sup> *Lindsay v. Jackson*, 2 Paige, 581.      junction will be dissolved, S. C., 3 Tenn. Ch., 352.

<sup>21</sup> *Bridges v. Robinson*, 2 Tenn. Ch., 720. See, as to the circumstances under which such an in-      <sup>22</sup> *Belohradsky v. Kuhn*, 69 Ill., 547.

<sup>23</sup> *Hodgson v. Murray*, 3 Sim.,

law.<sup>24</sup> So equity will not enjoin the negotiation of a note upon the ground that it has been materially altered since its execution and delivery since that fact would constitute a good defense to an action at law upon the note even as against an innocent purchaser for value.<sup>25</sup> And a purchaser of a chattel, such as a vessel, can not enjoin the negotiation of notes given for the unpaid purchase money, upon the ground of alleged defects in article sold, which, if they existed at all, were apparent at the time of his purchase.<sup>26</sup>

§ 1130. **Plaintiff must do equity.** In applications for injunctions against the negotiation of promissory notes the plaintiff must himself do equity before he is entitled to relief. And one who has borrowed money from a bank in excess of the amount which the bank could lawfully lend and given notes and securities therefor, can not enjoin the bank from negotiating such notes and securities upon the ground of its violation of the law in making the loan.<sup>27</sup>

§ 1131. **Accommodation paper.** The maker of accommodation paper, which is held by a bank as collateral security to an indebtedness of the person for whose accommodation the notes were given, can not enjoin the collection of such notes, even though the bank holds other security for the indebtedness, and although the bill alleges that the notes were given upon fraudulent representations; since the maker in such case does not occupy the position of a surety entitled to compel a creditor holding two funds as security to resort to that one upon which the surety has no claim.<sup>28</sup>

283, reversing S. C., 2 Sim., 516. But see Teed v. Marvin, 41 Mich., 216, where an injunction was sustained against the enforcement of notes and a mortgage given without consideration.

<sup>24</sup> Galusha v. Flour City Bank, 1 Hun, 573; S. C., 4 Thomp. & C., 68.

<sup>25</sup> Erickson v. First National Bank, 44 Neb., 622, 62 N. W., 1078, 28 L. R. A., 577, 48 Am. St. Rep., 753.

<sup>26</sup> Lynch v. Kennedy, 27 La. An., 464.

<sup>27</sup> Elder v. Bank of Ottawa, 12 Kan., 238.

<sup>28</sup> Prout v. Lomer, 79 Ill., 331.

§ 1132. **Injunction in behalf of administrator.** An injunction has been allowed in behalf of an administrator to restrain the bringing of actions upon promissory notes which were indorsed by the intestate in his life-time, but which were never delivered until after his death, and which remained his property at the time of his death.<sup>29</sup>

§ 1133. **Effect of injunction; statute of limitations; interest.** The granting of an injunction to restrain a sale of real property under a deed of trust securing the payment of promissory notes has the effect of suspending the statute of limitations upon the notes themselves.<sup>30</sup> But as regards the effect of a transfer or assignment of a promissory note after the granting of an injunction against such transfer, it is held that the assignment is not absolutely void, but only void so far as concerns the rights of plaintiff in the injunction suit, and the assignee holds the note subject to such rights.<sup>31</sup> And the fact that the makers of promissory notes have been enjoined from paying them to a claimant, pending a litigation as to their ownership, would seem not to prevent the collection of interest upon such notes, since, notwithstanding the injunction, the payees might pay the money into court, and not having done so, they are properly chargeable with interest.<sup>32</sup>

<sup>29</sup> Carr v. Silloway, 111 Mass., 24.

<sup>31</sup> Wilhoit v. Castell, 3 Baxter,

<sup>30</sup> Williams v. Pouns, 48 Tex., 419.  
141.

<sup>32</sup> McKnight v. Chauncey, Selden's Notes, 97.

## III. NEGATIVE CONTRACTS.

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§ 1134. The remedy analogous to specific performance.

The remedy by injunction to prevent the violation of negative agreements, or contracts not to do a particular thing, is closely akin to the remedy by way of specific performance of agreements of an affirmative nature. In both cases the object sought is substantially one and the same, and by enjoining the violation of a negative contract a court of equity in effect decrees its specific performance.<sup>1</sup> Thus, in the case of an author who has contracted to write for a publisher and covenanted that he will not write for any other during the continuance of his agreement, an injunction will be allowed to restrain another publisher from employing him, thus, in effect, enforcing the performance of the contract.<sup>2</sup> So an author who has sold a work with an express stipulation that he will do nothing to interfere with its publication may be enjoined from publishing another work upon the same subject, whose publication would hinder and impede the sale of the first.<sup>3</sup>

<sup>1</sup> *Lumley v. Wagner*, 1 DeGex, M. & G., 604; *Stiff v. Cassell*, 2 Jur. N. S., 348; *Star Brewery Co. v. Primas*, 163 Ill., 652, 45 N. E., 145; *Welty v. Jacobs*, 171 Ill., 624, 49 N. E., 723, 40 L. R. A., 98; *South Chicago Ry. Co. v. Calumet Ry. Co.*, 171 Ill., 391, 49 N. E., 576. As to whether a court of equity should interfere by injunction in favor of the enforcement

of covenants which deprive a party of new and valuable discoveries of science, and, in a measure, tend to create a monopoly by contract, see *Steinau v. C. G. L. & C. Co.*, 48 Ohio St., 324, 27 N. E., 545.

<sup>2</sup> *Stiff v. Cassell*, 2 Jur. N. S., 348.

<sup>3</sup> *Barfield v. Nicholson*, 2 Sim. & St., 1; S. C., 2 L. J. Ch., 90.

§ 1134 *a*. **Implied negative covenant.** It is not essential to the granting of injunctive relief that the contract in question should contain an express negative covenant against the commission of the act sought to be restrained, where, from the nature of the contract and of the obligation assumed by the defendant, such a covenant may be fairly and reasonably implied, or where the express covenant, although affirmative in its form, is prohibitive in substance. Thus, where defendant, a consumer of electricity, had agreed to take all the electric energy required for his premises from the defendant company for a period of not less than five years, it was held that, although he was under no obligation to take the power at all if he did not so choose, yet when he did employ such power, it must be taken from the plaintiff exclusively, thus fairly implying a negative agreement not to take it from any other person, and an injunction was accordingly granted to restrain the breach of such negative covenant.<sup>4</sup>

§ 1135. **Relative convenience; remedy at law.** In the exercise of its jurisdiction by injunction to restrain the violation of contracts, equity looks only to the terms of the contract itself, and is not governed by considerations of the relative convenience and inconvenience to the parties likely to result from granting or withholding the relief. And if the contract right is clearly established and the violation is apparent, the agreement being of such a nature as to be capable of specific enforcement, an injunction may be granted regardless of the inconvenience to defendants.<sup>5</sup> Nor will it avail against the granting of the writ that the act complained of will be productive of no injury to the complainant, and may even be beneficial to him, since it is for

<sup>4</sup> *Metroplitan Electric S. Co. v. Ginder*, (1901) 2 Ch., 799. And see *Welty v. Jacobs*, 171 Ill., 624, 49 N. E., 723, 40 L. R. A., 98. See *post*, §§ 1151 *a*, 1164 *b* and 1164 *c* upon the subject of implied negative covenants in leases and in contracts for personal services.

<sup>5</sup> *Tipping v. Eckersley*, 2 Kay & J., 264; *Storer v. Great Western R. Co.*, 2 Y. & C. C. C., 48.

him to say whether the agreement shall be preserved, or whether he shall permit it to be violated. And the fact of the violation of the contract being established, the court may interfere without requiring proof of actual damage.<sup>6</sup> Nor will it avail defendant that the work undertaken in violation of the agreement is one of great public importance, or that great inconvenience is likely to result to the public in case he is compelled to perform his agreement.<sup>7</sup> But equity will not lend its aid by injunction in this class of cases when the covenant in question is too vague and uncertain to be specifically enforced, but will leave the party aggrieved in such case to pursue his remedy, if any, at law.<sup>8</sup> And where the measure of damages is clear and their amount easily and definitely ascertainable, equity may properly refuse to enjoin the violation of a negative covenant and may leave the plaintiff to the pursuit of his legal remedy for redress.<sup>9</sup>

§ 1136. **The same.** The rule as laid down in the preceding section is to be accepted with the qualification that considerations of the relative convenience and inconvenience to the parties are rejected only when the covenants themselves are clear and free from doubt, and their violation is clearly established, and where irreparable injury is likely to result unless the breach is restrained. But, if these conditions do not co-exist, the question to be determined is one of comparative injury, and the court will be governed by considerations of the relative inconvenience likely to result to the

<sup>6</sup> *Dickenson v. Grand Junction Canal Co.*, 15 Beav., 270. And see *R. 2 Ch.*, 147; *Foster v. Birmingham R. Co.*, 2 W. R., 378.

*Ingram v. Morecraft*, 33 Beav., 49;

*Steward v. Winters*, 4 Sandf. Ch.,

587; *World's Columbian Exposition v. United States*, 6 C. C. A.,

58, 56 Fed., 654.

<sup>7</sup> *Lloyd v. London, C. & D. R.*

*Co.*, 2 DeGex, J. & S., 568; *Ra-*

*phael v. Thames Valley R. Co.*, L.

<sup>8</sup> *Armstrong v. Courtenay*, 15 Ir. Ch., 138.

<sup>9</sup> *Steinau v. C. G. L. & C. Co.*,

48 Ohio St., 324, 27 N. E., 545;

*World's Columbian Exposition v.*

*United States*, 6 C. C. A., 58, 56

Fed., 654.

parties from granting or refusing the relief.<sup>10</sup> And upon an application for an interlocutory injunction to restrain a breach of covenant, if the question is involved in doubt, the burden rests upon the party complaining to show that the balance of convenience is in favor of granting the injunction.<sup>11</sup> But the relief will not be withheld merely because the agreement contains other covenants which are likely to be broken in the future.<sup>12</sup>

§ 1137. **Certainty; damages; threatened breach.** Certainty is an essential element in the contract whose enforcement is sought by injunction, and where a covenant is indefinite and uncertain in its provisions no injunction will be allowed.<sup>13</sup> So, too, it is usually requisite that the party aggrieved should show some appreciable damage as the result of the breach of covenant which he seeks to restrain. And a grantee with covenants of quiet enjoyment will not be allowed an injunction to prevent his grantor from raising the level of a stream running through the premises of the grantor and past those of the grantee, where no damages result from the act which are susceptible of appreciation, there being no covenant against doing that particular act.<sup>14</sup> It is not, however, requisite that the breach of covenant against which preventive relief is sought in equity should have been actually committed at the time of making the application, and it is a sufficient ground of interference that defendant insists upon his right to do the act in question.<sup>15</sup> But equity will not assume that defendant intends to violate his covenant and will not interpose unless it is manifest that a breach is intended.<sup>16</sup>

<sup>10</sup> *Wilkinson v. Rogers*, 12 W. R., 284.

<sup>11</sup> *Child v. Douglas*, 5 DeGex, M. & G., 739, reversing S. C., Kay, 560.

<sup>12</sup> *Rigby v. Great Western R. Co.*, 15 L. J. Ch., 271.

<sup>13</sup> *Low v. Innes*, 10 Jur. N. S., 1037.

<sup>14</sup> *Ingram v. Morecraft*, 33 Beav., 49.

<sup>15</sup> *Tipping v. Eckersley*, 2 Kay & J., 264.

<sup>16</sup> *Foster v. Birmingham R. Co.*, 2 W. R., 378.



§ 1138. **When covenant controlled by recitals.** While a covenant in an instrument may, if ambiguous, be controlled by the recitals in the same instrument,<sup>17</sup> yet if it contains an absolute covenant not to do a particular act, such covenant will not, in the absence of any proceedings to rectify the agreement, be controlled by a recital from which it appears that the parties intended that the act might be done upon payment of a fixed sum by way of liquidated damages, and an interlocutory injunction will issue to restrain the breach of the covenant.<sup>18</sup> But the fact that a right of re-entry is reserved to a lessor in the event of a breach of covenant does not preclude him from obtaining relief in equity against the commission of the breach, since he is not bound to adopt the remedy of re-entry provided in the lease, but may seek relief in an equitable forum.<sup>19</sup>

§ 1139. **Penalty and liquidated damages.** In all cases where a fixed sum of money is mentioned in the instrument as payable upon a breach of covenant, the question for determination is whether the sum named was intended as a penalty to secure the faithful performance of the covenant, or whether it was designed as an equivalent to be paid for the privilege of doing the act forbidden. And where the covenant is absolute in its terms, and the specified sum has been inserted as a penalty to insure the faithful performance of the obligations thereby imposed, the payment of the penalty will not deprive equity of its jurisdiction to restrain the commission of the forbidden act.<sup>20</sup> Upon the other hand,

<sup>17</sup> *Selby v. Crystal Palace Gas man v. Walter*, 1 Bro. C. C., 418; Co., 30 Beav., 606. *French v. Macale*, 2 Dr. & War.,

<sup>18</sup> *Bird v. Lake*, 1 Hem. & M., 269; S. C., 1 Con. & Law., 459; 111. *Burne v. Madden Llo. & Goo.*

<sup>19</sup> *Parker v. Whyte*, 32 L. J. Ch., temp. Plunkett, 493; *Bray v. Fogarty*, 1 R. 4 Eq., 544; *Diamond*

<sup>20</sup> *Bird v. Lake*, 1 Hem. & M., 111; *Hardy v. Martin*, 1 Cox, 26; *Match Co. v. Roeber*, 106 N. Y., 473, 13 N. E., 419; *McCaul v. Howard v. Hopkyns*, 2 Atk., 371; *Braham*, 21 Blatch., 278; S. C., 16 *Fox v. Scard*, 33 Beav., 327; *Slo-Fed.*, 37. And see § 1175, *post*,

if it is manifest that the parties intended that the particular act might be done upon payment of the sum specified, the power to do the act upon payment of the money enters into and forms a part of the contract, and equity will neither interfere to prevent the doing of the act, nor to grant relief from the payment of the money agreed upon as an equivalent.<sup>21</sup> As illustrating this distinction, it is held that where a lessee of lands covenants not to burn over any portion of the premises demised, under the penalty of a certain fixed sum per acre, to be recovered as additional rent for every acre burned, he is not entitled to burn over the ground upon payment of the amount specified as liquidated damages, and the penalty does not deprive a court of equity of its jurisdiction to restrain the act.<sup>22</sup> But where the lessee covenants not to plow up pasture lands, or, if he does, that he will pay a certain sum for every acre plowed, an injunction will not be granted to restrain him from plowing, the relief being refused upon the ground that the parties have themselves fixed the damages and agreed upon the price to be paid for doing the act.<sup>23</sup>

§ 1140. **The same.** It is to be observed, however, that the use of the terms "penalty" and "unliquidated damages" in the instrument is not necessarily conclusive as to the interpretation which shall be put upon it, and the sum so reserved may be held to be liquidated damages, although called a penalty in the covenant, and *vice versa*.<sup>24</sup> But where the covenant is in its nature a continuing one, and the sum spe-

and cases cited. See *Maxwell v. Mitchell*, 1 Ir. Eq., 359.

<sup>21</sup> *Ranger v. Great Western R. Co.*, 5 H. L., 94; *Street v. Rigby*, 6 Ves., 818; *Barnes v. McAllister*, 18 How. Pr., 534; *Nessle v. Reese*, 29 How. Pr., 382; *Vincent v. King*, 13 How., Pr., 234. And see *Sainter v. Ferguson*, 1 Mac. & G., 286.

<sup>22</sup> *French v. Macale*, 2 Dr. & War., 269.

<sup>23</sup> *Woodward v. Gyles*, 2 Vern., 119; *Rolfe v. Patterson*, 2 Bro. P. C., 436.

<sup>24</sup> *Gerrard v. O'Reilly*, 3 Dr. & War., 414; S. C., 2 Con. & Law., 165; *Bird v. Lake*, 1 Hem. & M., 111; *Tode v. Gross*, 127 N. Y., 480, 28 N. E., 469, 13 L. R. A., 652.

cified as payable upon the breach is to be recovered in the reserved rent, it is regarded in equity as a penalty and not as liquidated damages.<sup>25</sup> But the fact that the sum specified in the lease as payable upon the breach of the covenant may be largely in excess of the real damage will not of itself render the sum so reserved a penalty, since it will be construed as an increased rent fixed by the parties to be paid during the remainder of the term.<sup>26</sup>

§ 1141. **Present and reversionary interests.** The question whether relief by injunction shall be granted against a breach of covenant is sometimes determined by the relation which the party aggrieved sustains to the premises, as whether he is actually in possession, with a right to the present enjoyment of the property, or whether his interest is that of a remainder-man or reversioner. And while the person seeking specific performance of a covenant, if actually in possession, is entitled to the protection of equity in the enjoyment of the property according to his covenant, yet if he be entitled only in remainder or reversion, some special damage by reason of the breach must be shown before a court of equity will interfere.<sup>27</sup> Thus, where premises are demised upon condition that they shall be used only for dwelling purposes, and that no trade or business of any nature shall be carried on upon the premises, the remainder-man, who files a bill for relief against a breach of the covenant, the tenant for life refusing to interfere, will not be allowed an injunction when he fails to show some special and material damage as the result of the infraction. But if the lessee were carrying on a grossly noxious or offensive trade, it would seem that relief might be allowed the remainder-man.<sup>28</sup>

<sup>25</sup> French v. Macale, 2 Dr. & War., 269; S. C., 1 Con. & Law., 459.

<sup>26</sup> Woodward v. Gyles, 2 Vern., 119.

<sup>27</sup> Johnstone v. Hall, 2 Kay & J., 414. See also McDaniel v. Callan, 75 Ala., 327.

<sup>28</sup> Johnstone v. Hall, 2 Kay & J., 414.

§ 1142. **Restrictive covenants in leases.** Courts of equity are frequently called upon to prevent by injunction the violation of negative covenants annexed to leases, and thus indirectly to enforce specific performance of the contract for the benefit of the lessor. Thus, where premises are leased under an express covenant on the part of the tenant that he will not convert meadow land, an injunction will be allowed to prevent him from breaking up meadow land for the purpose of building, the relief being granted expressly because of violation of covenant, and not upon the ground of waste.<sup>29</sup> So where there is a devise of realty to successive tenants for life with a restriction against mowing the premises, an injunction may be had to prevent mowing in violation of the restriction.<sup>30</sup> And where a lessee is, by the terms of his lease, restricted to a particular use of the demised premises, equity will restrain him from other use of them, even though no irreparable injury be shown to result from such breach of covenant. The interference in such case is based upon the ground that, while there is a remedy at law for breach of the covenant on the part of the lessee, a new suit would have to be brought daily for each daily repetition of the offense, and an injunction is therefore necessary to prevent a multiplicity of suits, as well as on the ground of the great difficulty in estimating damages at law for such a grievance.<sup>31</sup>

<sup>29</sup> *De Wilton v. Saxon*, 6 Ves., 135 Ill., 371, 25 N. E., 795; *Linwood Park Co. v. Van Dusen*, 63

<sup>30</sup> *Blagrave v. Blagrave*, 1 DeG. & Sm., 252. Ohio St., 183, 58 N. E., 576. *Steward v. Winters*, 4 Sandf. Ch., 587,

<sup>31</sup> *Steward v. Winters*, 4 Sandf. Ch., 587; *Godfrey v. Black*, 39 Kan., 193, 17 Pac., 849; *Stees v. Kranz*, 32 Minn., 313, 20 N. W., 241; *Tod-Heatly v. Benham*, 40 Ch. D., 80; *Fetherstonhaugh v. Hagarty*, 3 L. R. Ir., 150; *Consolidated Coal Co. v. Schmisseeur*, 135 Ill., 371, 25 N. E., 795; *Linwood Park Co. v. Van Dusen*, 63 Ohio St., 183, 58 N. E., 576. *Steward v. Winters*, 4 Sandf. Ch., 587, was a bill by a lessor to restrain his lessee from using the premises demised as an auction store, the lease containing a covenant that the store should be "occupied by the regular dry goods jobbing business, and for no other kind of business." A motion to dissolve

§ 1143. **The same illustrated.** Illustrations of the doctrine as above discussed are various, but the governing principle

the injunction was denied, Sandford, Vice Chancellor, observing as follows: “\* \* \* It is said that the remedy at law for damages is adequate, and that, so far from there being an irreparable injury by the continuance of the breach of this covenant, it is shown there can be no injury at all. I apprehend that we are not to regard this subject in the manner indicated by the latter proposition. The owner of land, selling or leasing it, may insist upon just such covenants as he pleases touching the use and mode of enjoyment of the land; and he is not to be defeated when the covenant is broken, by the opinion of any number of persons that the breach occasions him no substantial injury. He has a right to define the injury for himself, and the party contracting with him must abide by the definition. In the case of the bakery in 1 Vesey & Beames, hereafter cited, I have no doubt a great many witnesses might have been found who would have testified that the bakery was not an annoyance to them, or to any but over-sensitive persons. And in *Hills v. Miller*, 3 Paige, 254, the injury to the complainant, if testified by the opinions of witnesses, would scarcely have resulted in even nominal damages, in an action at law. It is not necessary that the act complained of should amount to a nuisance in law, either public or private. Nor is the court to enter into a comparison,

and permit a tenant to carry on some trades as less offensive than others, where the covenant prohibits the former. (Per Lord Eldon, in *Macher v. The Foundling Hospital*, 1 Ves. & B., 188). So far as the injury is concerned, it is therefore unnecessary for the complainant to establish that it will be irreparable, or on a continuing covenant that it will be substantially injurious. The question remains, is there an adequate remedy at law? In the first place, it is manifest that at law a new cause of action will arise every day that the defendants sell at auction. If the lessor avail himself of his full rights at law, he will sue daily for damages. This would lead to a multiplicity of suits, harassing to both parties, and highly obnoxious to the censure of a court of equity. Then, if the suits were brought, how is it possible to estimate the actual damages? A jury might enter into a wide field of conjecture, without any certainty of coming out of it at the point of justice to the parties. The jurors might infer that the continuance of an auction business in the demised premises would for years diminish the rent of the adjoining property, and render the premises less desirable to good tenants. But any estimate of damages on that basis, however well founded, would be wholly conjectural. A different jury might imagine that the conducting of an auction business

underlying them all is substantially the same. Thus, where premises are leased under an express covenant not to carry on a business which will interfere with that of lessors upon their adjoining premises, upon pain of forfeiture of the lease and payment of a penalty, defendants may be restrained from violating the covenant by carrying on the business, the relief being regarded as analogous to that by specific performance, and the jurisdiction being exercised upon the ground that the breach of the agreement would be a constantly recurring grievance.<sup>32</sup> And when the lease contains a covenant that the demised premises shall not be used for any purposes which may cause "annoyance, nuisance, grievance or damage" to the lessor, or to the inhabitants of the neighboring premises, the use of the premises as a hospital for the treatment of contagious diseases is such a breach of the covenant as to warrant an injunction.<sup>33</sup> So when a farm is leased, reserving to the landlord the right of hunting and taking game upon the premises, an unauthorized interference with such right by the lessee may be enjoined.<sup>34</sup> And when the proprietor of a hotel enters into a contract with a telegraph company, giving it the exclusive right to

would enhance the value of the adjoining premises, and refuse to give any damages. And witnesses could undoubtedly be produced whose opinions would sanction a finding in either of these modes. I think that in a case where the parties, by an express stipulation, have themselves determined that a particular trade or business conducted by the one will be injurious or offensive to the other, and there is a continuing breach of the stipulation by the one, which this court can perceive may be highly detrimental to the other, although on the facts presented it is not

clear that there is a serious injury, and it is manifest that the extent of the injury is difficult to be ascertained or measured in damages, it is the duty of the court, by injunction, to restrain further infractions of the covenant, thereby preventing a multiplicity of petty suits at law, and at the same time protecting the rights of the complainant."

<sup>32</sup> *Barret v. Blagrove*, 5 Ves., 555.

<sup>33</sup> *Tod-Heatly v. Benham*, 40 Ch. D., 80.

<sup>34</sup> *Fetherstonhaugh v. Hagarty*, 3 L. R. Ir., 150.

maintain a telegraph office in the hotel during the existence of the contract, he may be enjoined from permitting another company to establish a competing office in the hotel.<sup>35</sup> And where a lessee covenants to occupy the demised premises as a hotel, an injunction will be granted restraining the use of the premises for a homestead or for any purpose other than that of a hotel.<sup>36</sup> So where the lease provided that the demised premises were to be used for creamery purposes, the lessee was restrained from occupying them for a warehouse.<sup>37</sup> So where a lease provides that the lessee shall use the premises for residence only except upon a special permit from the lessor, the latter is entitled to an injunction to restrain the lessee from letting the premises out to roomers and lodgers.<sup>38</sup> But where in a farm lease the tenant covenants that he will at all times during the tenancy keep a sufficient number of cattle and horses upon the farm, equity will not enjoin a breach of this covenant, since the granting of the relief would in effect require the court to superintend the operation of the farm during the entire term.<sup>39</sup> And if defendants have been allowed to continue their acts for a long period of years, without objection, complainants are estopped from relief in equity, and must seek a remedy at law.<sup>40</sup> It is held, however, that in such case no pretense

<sup>35</sup> *Western Union T. Co. v. Rogers*, 42 N. J. Eq., 311, 11 Atl., 13.

<sup>36</sup> *Spalding Hotel Co. v. Emerson*, 69 Minn., 292, 72 N. W., 119.

<sup>37</sup> *Kraft v. Welch*, 112 Iowa, 695, 84 N. W., 908.

<sup>38</sup> *Linwood Park Co. v. Van Dusen*, 63 Ohio St., 183, 58 N. E., 576.

<sup>39</sup> *Phipps v. Jackson*, 56 L. J. R. N. S. Ch., 550.

<sup>40</sup> *Barret v. Blagrove*, 6 Ves., 104. In the latter case the right to the injunction was based upon the claim by complainants that the business carried on by defendants

came within the terms of the covenant. It appeared, however, that it had been carried on without interruption for more than ten years. Eldon, Lord Chancellor, said: "May not a very different question be made: whether if you have permitted this to go on for eleven years, you must not take your chance at law? I have not the least doubt that what is stated in the affidavits is within the terms of the covenant; but the question is, whether you can have a specific performance under such cir-

of title acquired by long continued enjoyment, on the part of the lessee, can avail him, if such enjoyment be adverse to the covenants of his lease.<sup>41</sup>

§ 1144. **Further illustrations; sub-lessee; action by third person.** Upon similar principles the lessee of a mine, who has covenanted by the terms of his lease not to remove certain machinery from the mine, may be enjoined from violating his agreement.<sup>42</sup> And where the lessee has agreed not to carry on any trade or business upon the premises leased, an injunction will be allowed to prevent him from using the premises for school purposes.<sup>43</sup> Nor is the jurisdiction confined merely to restraining the original tenant from breach of covenant, but it may properly be exercised against a sub-lessee who has covenanted not to carry on a particular trade on the premises demised, even though such covenant appears only in the assignment of the lease and not in the original instrument.<sup>44</sup> So when it is covenanted in the lease that no intoxicating liquors shall be sold upon the premises, a sub-lessee may be restrained from violating such covenant.<sup>45</sup> And a covenant in a lease that a house shall be used only

cumstances, the parties having from the execution of the lease, eleven years ago, permitted that covenant to stand an ineffective part of the lease. I rather doubt whether, so far from the court's interfering at your instance, a bill might not be filed to prevent your suing at law upon that covenant. If there are equitable circumstances to prevent your taking your legal remedy, surely they will prevent your having a specific performance." And the injunction was accordingly dissolved. But see, *contra*, *Society v. Low*, 2 C. E. Green, 19, where it is held that the covenant is a con-

tinuing covenant, running with the land, and its violation being of constant recurrence, the lessor's right to relief is not forfeited by long delay in making his application.

<sup>41</sup> *Society v. Low*, 2 C. E. Green, 19.

<sup>42</sup> *Hamilton v. Dunsford*, 6 Irish Ch., 412.

<sup>43</sup> *Kemp v. Sober*, 1 Sim. N. S., 520.

<sup>44</sup> *Clements v. Welles*, 1 L. R. Eq., 200. See also *Maunsell v. Hort*, L. R. 1 Ir. Ch. D., 88, affirming S. C., 1 L. R. 11 Eq., 478.

<sup>45</sup> *Steas v. Kranz*, 32 Minn., 313.



for the purposes of a dwelling house is held to be a covenant running with the land, and although the assignees of the lease are not mentioned in the covenant, an injunction will be granted to prevent a breach by an assignee of the lease and his sub-tenant.<sup>46</sup> So where a lease contains a provision subjecting the lessee to such rules and regulations as may be adopted by the lessor for the government of the demised premises and the lessor adopts a rule prohibiting the sale of merchandise upon the premises without a license from him, the violation of such regulation by an assignee of the lease taking with knowledge of the covenant will be enjoined.<sup>47</sup> So an injunction will lie to restrain the breach of a covenant contained in a lease against an assignment of the lease without the consent of the lessor. Thus, where the leasehold has been assigned with the consent of the lessor, the re-assignment by the assignee to the original lessee without the consent of the lessor will be restrained.<sup>48</sup> So when premises are demised with a covenant in the lease that the lessee shall erect a house thereon fit for use by a private family and for no other purpose, under a given penalty as additional yearly rent, a violation of the covenant by a sub-lessee, with notice, by converting the house so erected into a public house, will warrant an injunction against such breach of the covenant.<sup>49</sup> And where the lease contains a covenant by the lessee against permitting any auction sale to be held upon the premises, an injunction may be granted to prevent a breach of the agreement by a sub-lessee, even though he had no actual notice of the particular covenant in the original lease, when he might readily have acquired such information upon inquiry. Nor does the remedy of re-entry for condition broken, provided in the lease, bar relief in equity in such a case.<sup>50</sup>

<sup>46</sup> *Wilkinson v. Rogers*, 12 W. R., 284.

<sup>47</sup> *Round Lake Assn. v. Kellogg*, 141 N. Y., 348, 36 N. E., 326.

<sup>48</sup> *McEacharn v. Colton*, App. Cas. (1902), 104.

<sup>49</sup> *Bray v. Fogarty*, I. R. 4 Eq., 544.

<sup>50</sup> *Parker v. Whyte*, 1 Hem. &

So equity will enjoin the violation of a provision contained in a lease by which the lessee covenants with the lessor not to sell upon the demised premises any beer except that manufactured by a certain brewery.<sup>51</sup> And in such case, the one for whose benefit the contract is thus made, although not a party to it, may maintain an action to restrain a violation of the covenant.<sup>52</sup>

§ 1145. **Further illustrations.** It is also held that where a lessee covenants with his lessor that he will not carry on or suffer to be carried on or exercised upon the demised premises any trade or business, and that he will not suffer any act or thing which may be an annoyance, injury or inconvenience to the neighboring premises, the conducting of a hospital upon the premises is a breach of the covenant which constitutes sufficient ground for relief by injunction.<sup>53</sup> And where a lessee covenants not to permit any outward mark or show of business to be affixed to the premises, the inscribing defendant's name and business upon the blinds and upon a plate fastened upon the railing in front of the premises, constitutes such a breach of the covenant as to warrant an injunction. And to prevent relief by injunction in such a case upon the ground of acquiescence, defendant must show such a case of acquiescence as to forever preclude plaintiff from insisting upon his right under the agreement.<sup>54</sup>

§ 1146. **Applications of the doctrine.** To warrant the interference of equity against breaches of covenants limiting the use of demised premises, it is not requisite that the act complained of should amount to a nuisance in law, either

M., 167; S. C., 32 L. J. Ch., 520.  
See *Trenor v. Jackson*, 46 How.,  
Pr, 389.

<sup>51</sup> *Ferris v. American B. Co.*,  
155 Ind., 539, 58 N. E., 701, 52 L.  
R. A., 305.

<sup>52</sup> *Ferris v. American B. Co.*,  
155 Ind., 539, 58 N. E., 701, 52 L.  
R. A., 305.

<sup>53</sup> *Bramwell v. Lacy*, 10 Ch. D.,  
691.

<sup>54</sup> *Evans v. Davis*, 10 Ch. D., 747.

public or private.<sup>55</sup> And permitting one trade to be carried on without objection will not raise an inference that the lessee may afterward carry on another, nor will the court in such case enter into a comparison as to which of several trades is more offensive than others.<sup>56</sup> And where a lessee covenants against using the premises as a shop or warehouse for any trade, without a written license, or permitting anything which might grow to the damage and inconvenience of lessors or any of their other tenants, a court of equity will not grant an injunction against entering judgment and issuing execution in ejectment for breaches of the covenants.<sup>57</sup> Where, however, a contract between lessor and lessee is so harsh and oppressive upon the lessee that equity ought not to give it effect, an injunction to restrain its violation will be refused.<sup>58</sup>

§ 1147. **The doctrine as affected by fraud.** Relief by injunction may properly be extended in the class of cases under consideration upon the ground of fraud, even though the lease containing the restrictive covenants has been surrendered up and is no longer operative. For example, where a lessee who holds the premises under a lease containing a covenant not to build houses thereon, at less than a specified distance apart, sub-lets a portion of the premises, representing to the sub-lessee that he can not build except upon the conditions specified, and afterward surrenders the old lease and takes out a new one without such restrictions, and then proceeds to build in disregard of the conditions named, he may be enjoined from proceeding. In such case, although the covenant is destroyed by the surrender of the former lease, yet defendant having made such representations and

<sup>55</sup> *Steward v. Winters*, 4 Sand. Ch., 587. And see *Macher v. Foundling Hospital*, 1 Ves. & B., 188.

<sup>56</sup> *Macher v. Foundling Hospital*, 1 Ves. & B., 188.

<sup>57</sup> *Macher v. Foundling Hospital*, 1 Ves. & B., 188.

<sup>58</sup> *Talbot v. Ford*, 13 Sim., 173.

induced action thereon, an appropriate case is presented for restraining him from proceeding in disregard of the specified conditions.<sup>59</sup>

§ 1148. **Relief in behalf of receiver.** It is also held, in case of the appointment of a receiver over premises which are held by the tenant under a lease containing a covenant against the use of the demised premises for a particular purpose, as for a shop, upon pain of forfeiture of the lease, that the receiver is entitled to the aid of an injunction to restrain the tenant from using the premises for the prohibited purpose.<sup>60</sup>

§ 1149. **Lessee of adjoining premises not entitled to injunction.** It must, however, be borne in mind that when a restrictive covenant or prohibition of the general nature of those under discussion is inserted in a lease for the benefit of the lessors, to enable them to make the most of the property which they retain, and not for the benefit of the owners of adjacent property, such covenant will not inure to the benefit of another lessee of adjoining property from the same lessors; and such lessee is not, therefore, entitled to an injunction to restrain a breach of the covenant.<sup>61</sup>

§ 1150. **Lessor enjoined from breach of restrictive covenant; mandatory injunction.** The relief which is extended by courts of equity for the prevention of breaches of covenants or restrictions as between lessor and lessee is not limited to the protection of the lessor, but is freely extended in behalf of the lessee as well. Thus, where upon the execution of a lease the lessor agrees with his lessee that certain trees standing upon adjoining premises of the lessor shall not be cut down, a court of equity will protect the lessee by

<sup>59</sup> *Piggott v. Stratton*, 1 DeGex, F. & J., 33, affirming S. C., Johns., 341.

<sup>60</sup> *Mason v. Mason*, Flan. & K., 429.

<sup>61</sup> *Master v. Hansard*, 4 Ch. D., 718.

injunction against the cutting of the trees.<sup>62</sup> So where plaintiffs rent premises on which to erect a club house, upon an agreement by the lessors that a plot of ground adjacent thereto and under control of the lessors shall be laid out as an ornamental garden, and that no buildings shall be erected thereon, the lessors may be enjoined from erecting any buildings in violation of their agreement. And in such a case it would seem to be proper to grant the injunction in a form rendering it practically mandatory, as by restraining defendants from permitting such part of the buildings as they have already erected to remain.<sup>63</sup> So where a lessor had agreed with his lessee by parol that the latter should have the exclusive privilege of shooting game upon the premises during the tenancy, which agreement formed an essential part of the consideration or inducement for the tenant to take the premises, the lessor was enjoined from interfering with the tenant in his exercise of such right until defendant should execute a proper legal grant of the exclusive right to plaintiff.<sup>64</sup>

§ 1151. The doctrine further illustrated; subsequent lessees of original lessor enjoined; when not enjoined. So, too, where plaintiff rents certain premises from defendants, with a covenant upon the part of the latter that plaintiff shall have the sole right of selling certain kinds of goods thereon during a given period, a violation of such agreement by permitting others to sell such goods affords sufficient ground for relief by injunction.<sup>65</sup> And upon similar principles, where the proprietors of a slaughter-yard lease to plaintiffs adjoining premises for the business of manufacturing fertilizers, and by the terms of such lease plaintiffs are given the exclusive right of taking refuse matter from

<sup>62</sup> *Nicholson v. Rose*, 4 DeGex & J., 10.

<sup>64</sup> *Frogley v. Earl of Lovelace*, John., 333.

<sup>63</sup> *Rankin v. Huskisson*, 4 Sim., 13.

<sup>65</sup> *Altman v. Royal Aquarium Society*, 3 Ch. D., 228.

the premises of lessors, the proprietors of the slaughter-yard may be enjoined from permitting persons other than plaintiffs to take away such refuse matter; and the injunction may be granted as against lessees of the original lessor, who have acquired their rights subsequent to plaintiffs' lease and with notice thereof. And in such a case relief by injunction is proper upon the ground of the inadequacy of the remedy at law, since redress at law could be had only by a continued series of suits throughout the duration of plaintiffs' term.<sup>66</sup> But where the owner of a building has leased it to plaintiff's assignor, with an agreement not to rent any part of the adjoining building, which he owns, for the sale of intoxicating liquors, such agreement is not a charge upon the adjoining premises, and a subsequent lessee of a portion of the adjoining building, not being a party or privy to the agreement and not being legally affected by it, will not be enjoined from using his premises for the sale of intoxicating liquors.<sup>67</sup>

§ 1151 *a*. **Implied negative covenants in leases; covenant by lessor not to lease adjoining premises.** It is not always essential that the lease should contain an express negative agreement against the use of the demised premises which it is sought to restrain if such an undertaking may be fairly implied from the other terms and conditions of the instrument. And it has accordingly been held that a provision to the effect that the demised premises shall be used for certain specified purposes implies a negative covenant against their use for any purposes other than those named, and an injunction will therefore lie to restrain the violation of such implied covenant.<sup>68</sup> But unless the intention to restrict the

<sup>66</sup> Manhattan Manufacturing Co. v. New Jersey Stock Yard Co., 8 C. E. Green, 161.

<sup>67</sup> Napa Valley Wine Co. v. Boston Block Co., 44 Minn., 130, 46 N. W., 239, 20 Am. St. Rep., 562.

<sup>68</sup> Spalding Hotel Co. v. Emerson, 69 Minn., 292, 72 N. W., 119; Kraft v. Welch, 112 Iowa, 695, 84 N. W., 908.

enjoyment of the demised premises to a particular use clearly appears in the lease itself, or may be fairly implied from its terms, the lessee will not be enjoined from converting the property to other uses.<sup>69</sup> And it may be asserted generally that restrictive covenants in leases are to be strictly construed and that relief will not be granted, either upon behalf of the lessor or of the lessee, unless the negative stipulation is clearly implied. Where, therefore, a lessor covenants with his lessee not to lease any portion of the building in which the demised premises are situated for certain specified purposes, such an undertaking implies no obligation upon the part of the lessor not to use the building for such purposes himself, and a subsequent purchaser of the building will therefore not be enjoined from occupying it for the purposes forbidden by the lease.<sup>70</sup> So a covenant upon the part of a lessor not to lease the adjoining premises for certain purposes does not imply a covenant against merely permitting their use for such purposes. Thus, where the owner of premises, who has leased them to plaintiff for the carrying on of a certain business, covenants not to lease the adjoining property for the same business and afterwards makes a lease of the adjoining premises to the defendant for a purpose other than that prohibited by the plaintiff's lease, the defendant agreeing not to use them for any other purpose without the lessor's consent, the making of the second lease is not a breach of the covenant in the plaintiff's lease although the second lessee subsequently makes use of the premises for the prohibited purpose, and the plaintiff is therefore not entitled to an injunction to restrain either the second lessee from making such use of the premises or the owner from permitting him to do so.<sup>71</sup> But where a lessor

<sup>69</sup> Reed v. Lewis, 74 Ind., 433.

<sup>71</sup> Kemp v. Bird, 5 Ch. D., 549;

<sup>70</sup> Postal Telegraph Co. v. W. Ashby v. Wilson, (1900) 1 Ch., 66. U. T. Co., 155 Ill., 335, 40 N. E., 587.

*Contra*, Fitz v. Iles, (1893) 1 Ch., 77. In this case, no reference is

covenants not to carry on a certain business in the adjoining premises owned by him or to permit it to be carried on, and afterwards makes a lease of such premises to the defendant who proceeds to carry on the prohibited business, the lessor and his tenant who took with actual or constructive notice of the covenant will be enjoined from thus violating it.<sup>72</sup>

§ 1152. **Covenant need not run with the land.** One who has covenanted not to lease any house for hotel purposes, and not to lease any land within certain limits for the erection of a hotel, may be restrained from selling any land for such purpose, and from doing any act tending to the breach of his covenant.<sup>73</sup> Nor is it necessary that the covenant whose enforcement is sought should run with the land so as to be binding in law upon purchasers, since equity may restrain purchasers with notice of the covenant from doing any act in violation of its terms, although the covenant may not run with the land, so that no action at law could be maintained thereon against purchasers.<sup>74</sup> Thus, where one conveys a garden in fee, the grantee covenanting for himself and assigns that no buildings shall be erected upon the garden, a purchaser from the grantee with notice of such covenant will be restrained from violating it, regardless of whether he is bound by its terms at law.<sup>75</sup> And where land

made to the case of *Kemp v. Bird* which was decided in 1877. *Ashby v. Wilson*, decided in 1900, follows the reasoning of the *Kemp* case and rejects that of the *Fitz* case. The *Kemp* case is cited with approval and followed in *Postal Telegraph Co. v. W. U. T. Co.*, 155 Ill. 335, 40 N. E., 587, *supra*, and without doubt lays down the true rule. See *Halloway Bros. v. Hill*, (1902) 2 Ch., 612, in which the court remark that they can see

no inconsistency between *Kemp v. Bird* and *Fitz v. Hes*.

<sup>72</sup> *Halloway Bros. v. Hill*, (1902) 2 Ch., 612.

<sup>73</sup> *Jay v. Richardson*, 30 Beav., 563.

<sup>74</sup> *Tulk v. Moxhay*, 11 Beav., 571; S. C., 2 Ph., 774; *Kirkpatrick v. Peshine*, 9 C. E. Green, 206; *Catt v. Tourle*, L. R. 4 Ch., 654.

<sup>75</sup> *Tulk v. Moxhay*, 11 Beav., 571; S. C., 2 Ph., 774. "The question," observes Lord Cottenham in this



vested in trustees is sold in building lots, the conveyances containing certain restrictive covenants, it is held that each purchaser has an equity against the others to compel the faithful observance of the conditions.<sup>76</sup>

§ 1153. **Restrictive covenants in conveyances of realty; building line; mandatory injunction; property right must be shown; suit by beneficiary of covenant.** The aid of equity is frequently invoked to prevent the breach of covenants contained in conveyances of real estate. And it may be asserted as a general rule, that covenants prohibiting the purchaser from the erection of dwellings, or restricting him in the size or manner of erections, or the purposes for which the premises will be used, will be enforced in equity by restraining the purchaser or his assigns with notice, from their violation.<sup>77</sup> Thus, where one sells a lot adjoining his own premises, with a provision in the deed restricting the purchaser as to the size of the erections to be placed upon the premises, such a condition is regarded as for the benefit of the vendor, and subsequent purchasers of the property

case, "is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased."

<sup>76</sup> *Eastwood v. Lever*, 33 L. J. Ch., 357.

<sup>77</sup> *Clark v. Martin*, 49 Pa. St., 289; *Hills v. Miller*, 3 Paige, 254; *Trustees v. Cowen*, 4 Paige, 510; *Lattimer v. Livermore*, 72 N. Y., 174; *Hodge v. Sloan*, 107 N. Y., 244, 17 N. E., 335; *Rowland v. Miller*, 139 N. Y., 93, 34 N. E., 765, 22 L. R. A., 182; *Winnepesaukee Association v. Gordon*, 63 N. H., 505, 3 Atl., 426; *Sutton v. Head*, 86 Ky., 156, 5 S. W., 410; *Kelly*

*v. Carter*, 55 Ark., 112, 17 S. W., 706; *Blakemore v. Stanley*, 159 Mass., 6, 33 N. E., 689; *Reilly v. Otto*, 108 Mich., 330, 66 N. W., 228; *Star Brewery Co. v. Primas*, 163 Ill., 652, 45 N. E., 145; *Stines v. Dorman*, 25 Ohio St., 580; *Haskell v. Wright*, 8 C. E. Green, 389; *Kirkpatrick v. Peshine*, 9 C. E. Green, 206; *Mann v. Stephens*, 15 Sim., 377; *Seymour v. McDonald*, 4 Sandf. Ch., 502; *Lord Manners v. Johnson*, 1 Ch. D., 673; *Gaskin v. Balls*, 13 Ch. D., 324; *Collins v. Castle*, 36 Ch. D., 243; *Lloyd v. London, C. & D. R. Co.*, 2 DeGex, J. & S., 568; *Knight v. Simmonds*, (1896) 2 Ch., 294, 65 L. J. N. S. Ch., 583. See also *Bowes v. Law*, L. R. 9 Eq., 636.

may be enjoined from violating the covenant.<sup>78</sup> So where lots are conveyed by a deed containing a restrictive covenant which creates and establishes a building line, the violation of such covenant by the erection of buildings over the line will be enjoined.<sup>79</sup> And in such case the writ may properly issue in the mandatory form requiring the removal of the encroachments already completed.<sup>80</sup> And since the covenantee is entitled to the actual enjoyment, *modo et forma*, as stipulated by the covenant, the threatened breach is ordinarily sufficient ground for the injunction, regardless of the extent of the injury or damage to the complainant.<sup>81</sup> But in order to entitle plaintiff to relief against the violation of a restrictive covenant in the conveyance of real estate, he must show some right or beneficial interest in the land affected by the covenant or in adjoining lands, which will be injured as a result of the failure to perform the covenant; and where no such property right or interest is shown, the relief will be denied.<sup>82</sup> And where a conveyance of land contains a restrictive covenant upon the part of the grantee, such as the creation of a building line established with reference to adjacent property, the owner of an adjoining lot, who is a stranger to the conveyance and to the covenants in question, can not enjoin a violation of the covenant by a

<sup>78</sup> Clark v. Martin, 49 Pa. St., 289; Lattimer v. Livermore, 72 N. Y., 174.

<sup>79</sup> Attorney-General v. Algonquin Club, 153 Mass., 447, 27 N. E., 2, 11 L. R. A., 500; McGuire v. Caskey, 62 Ohio St., 419, 57 N. E., 53; Lord Manners v. Johnson, 1 Ch. D., 673.

<sup>80</sup> Attorney-General v. Algonquin Club, 153 Mass., 447, 27 N. E., 2, 11 L. R. A., 500; Lord Manners v. Johnson, 1 Ch. D., 673. As to the effect on building restrictions of a change in the neighborhood, see,

*post*, § 1158; Jackson v. Stevenson, 156 Mass., 496, 31 N. E., 691, 32 Am. St. Rep., 476; Ewertsen v. Gerstenberg, 186 Ill., 344, 57 N. E., 1051, 51 L. R. A., 310.

<sup>81</sup> Kirkpatrick v. Peshine, 9 C. E. Green, 206; Star Brewery Co. v. Primas, 163 Ill., 652, 45 N. E., 145; Consolidated Coal Co. v. Schmisser, 135 Ill., 371, 25 N. E., 796. This case was one of a restrictive covenant in a lease.

<sup>82</sup> Los Angeles University v. Swarth, 46 C. C. A., 647, 107 Fed., 798, 54 L. R. A., 262.

grantee of the original covenantor unless he can show that the restriction was created for the benefit of his property and unless that fact appears from the instrument itself which established the restriction.<sup>83</sup> And while equity may properly restrain parties from erecting buildings higher than they are authorized to do by their act of incorporation, or by the terms of a contract, a small excess in height above that authorized will not constitute ground for an interlocutory injunction to prevent the use of the building after it has been erected, no irreparable injury being shown from such excess.<sup>84</sup>

§ 1154. **Relief extended for and against purchasers and assigns.** The right to relief in cases of this nature is not limited to the original purchaser upon whom the conditions are imposed, but extends to his assigns who purchase with knowledge of the original covenants.<sup>85</sup> And where real estate is sold with covenants that no building shall be erected thereon, and it passes through the hands of successive purchasers, the final owner in fee, with notice of such covenants, may be restrained from violating them by the erection of buildings.<sup>86</sup> So where premises are conveyed with a covenant against using or permitting them to be used for the sale of spirituous liquors, and they are afterward sublet to a tenant from year to year, such sub-lessee may be enjoined from a violation of the covenant. And the relief may be granted although he had no actual knowledge of the

<sup>83</sup> *Hays v. St. Paul M. E. Church*, 196 Ill., 633, 63 N. E., 1040.

<sup>84</sup> *Warden v. South Eastern R. Co.*, 9 Hare, 489.

<sup>85</sup> *Haskell v. Wright*, 8 C. E. Green, 389; *Coles v. Sims*, 5 DeGex, M. & G., 1, affirming S. C., Kay, 56; *Watrous v. Allen*, 57 Mich., 362, 24 N. W., 104; *Hodge v. Sloan*, 107 N. Y., 244, 17 N. E., 335; *Lewis v. Gollner*, 129 N. Y., 227, 29 N.

E., 81, 26 Am. St. Rep., 516; *Rowland v. Miller*, 139 N. Y., 93, 34 N. E., 765, 22 L. R. A., 182; *Winnepesaukee Association v. Gordon*, 63 N. H., 505, 3 Atl., 426; *Star Brewery Co. v. Primas*, 163 Ill., 652, 45 N. E., 145.

<sup>86</sup> *Mann v. Stephens*, 15 Sim., 377. And see *Seymour v. McDonald*, 4 Sandf. Ch., 502.

original covenant, since he is bound by the terms of the original conveyance.<sup>87</sup> So under a similar covenant in a conveyance, a purchaser from the original grantee may be enjoined from selling liquor upon the premises, notwithstanding a condition in the conveyance that a breach of the covenant in question shall work a forfeiture of the estate.<sup>88</sup> And where plaintiff purchases a hotel, and in part payment therefor conveys to his grantor premises situated in the same town which were formerly used as a hotel, the conveyance containing a covenant that the premises thus conveyed by plaintiff shall not be used as a hotel or boarding-house by the grantee or his assigns so long as the property purchased by plaintiff shall be used for hotel purposes, a remote grantee may be restrained from using the premises so conveyed by plaintiff for hotel purposes.<sup>89</sup> So where the owner of land upon both sides of a river is engaged in operating a ferry across the river, and conveys land which constitutes his ferry landing upon one side of the river, with a condition in the deed that the grantee, his heirs or assigns shall not establish or authorize the establishment of a ferry landing upon the premises conveyed, without permission from the grantor, his heirs or assigns, such condition becomes operative upon a purchaser under the grantee, and he may be enjoined from its violation.<sup>90</sup>

§ 1155. **Illustrations of the general doctrine.** As still further illustrating the doctrine under discussion, it is held that when a purchaser of land on which is situated a well covenants with his vendor, who retains adjoining lands intended to be sold for business purposes, to forever supply water from such well to all houses that may be erected upon the vendor's adjoining land, a violation of such covenant

<sup>87</sup> *Feilden v. Slater*, L. R. 7 Eq., 523. being no bar in the case of leases, see, *ante*, § 1444.

<sup>88</sup> *Watrous v. Allen*, 57 Mich., 362, 24 N. W., 104. As to the right <sup>89</sup> *Stines v. Dorman*, 25 Ohio St., 580.

of re-entry for condition broken <sup>90</sup> *Frye v. Partridge*, 82 Ill., 267.

affords sufficient ground for an injunction.<sup>91</sup> And when, upon the sale of land, it is covenanted that the vendor shall have the exclusive right to supply all the ale and beer which shall be consumed in any building to be erected upon the premises, the covenant is of such a nature as to entitle the vendor to the aid of equity by injunction to restrain its violation.<sup>92</sup>

§ 1156. **Construction of the term "adjoining."** It sometimes becomes important to determine the meaning and extent of the term "adjoining," as used in covenants restricting the use of demised premises for the protection of neighboring owners or residents. And where a conveyance of land contains a covenant that the purchaser will not do or permit anything to be done upon the premises which shall be a nuisance to the owners or occupants of adjoining premises, and such purchaser afterward sells the land in different lots, the deed to each of his purchasers containing a similar covenant, the term "adjoining" is held applicable to the property adjacent to each lot, and not merely to the property adjoining the entire tract originally sold. The owner of such lots may, therefore, maintain a bill to restrain a breach of such covenant. But the erection of a school house upon one of the lots and the consequent inconvenience thereby resulting to the adjacent owners will not be regarded as such a nuisance as to justify an injunction.<sup>93</sup>

§ 1157. **Relief as between different purchasers.** Where adjoining lots in the same block are from time to time sold to different purchasers, the conveyances of the lots containing mutual covenants between the grantor and the respective grantees against the erection of any noxious or offensive structure on the premises, and against carrying on any trade

<sup>91</sup> *Cooke v. Chilcott*, 3 Ch. D., 694.

<sup>93</sup> *Harrison v. Good*, L. R. 11 Eq., 338.

<sup>92</sup> *Catt v. Tourle*, L. R. 4 Ch., 654.

or business whatsoever which might be in anywise offensive to the neighboring inhabitants, the covenants in the deeds are regarded in equity as for the mutual benefit and protection of all the purchasers. And although a prior purchaser in such case might have no right of action at law upon a covenant in a deed to a subsequent purchaser, he is entitled to the aid of equity by injunction to restrain the carrying on of any noxious or offensive business, such as a coal yard, upon the lot of such subsequent purchaser. And upon demurrer to the bill, its allegations as to the noxious effects of coal dust upon adjoining residents, although highly wrought and expressed in ornate and poetical language, will not be regarded as a fiction, and the demurrer will be overruled.<sup>94</sup> Nor is it necessary that the restrictive covenant

<sup>94</sup> *Barrow v. Richard*, 8 Paige, 351, affirming *S. C. sub nom. Barron v. Richard*, 3 Edw. Ch., 102. "There can be no doubt," observes Walworth, Chancellor, "if the allegations in the bill are true, that the use of lots No. 12 and 13 as a coal yard is a clear violation of the covenants of the grantees of those lots. The language of the covenants shows that several other uses of the lots, far less offensive than this, are in terms prohibited on the ground that they would probably be offensive to the neighborhood. The allegation in the bill on this subject, though it is a little poetical, can not be considered a mere poetic fiction, as it is sworn to by the complainant and is admitted by the demurrer. He there states that large quantities of volatile and offensive dust and smut from the coal rise in the air, and are diffused by the wind into the premises of the neighbor-

ing inhabitants. And in spite of all their care, such coal dust and smut not only settles upon their walks, and their grass-plats, but also on their fragrant plants and flowers, 'beclouding the brightness and beauty which a beneficent Creator has given to make them pleasant to the eye, and cheering to the heart of man.' But what must be still more offensive to the ladies of the neighborhood, 'this filthy coal dust settles upon their doorsteps, thresholds and windows, and enters into their dwellings, and into their carpets, their cups, their kneading troughs, their beds, their bosoms, and their lungs; discoloring their linen and their otherwise stainless raiment and robes of beauty and comfort, defacing their furniture, and blackening, besmearing and injuring every object of utility, of beauty, and of taste.' Making all due allowance for the coloring which the pleader has

should be contained in the conveyance under which defendant claims, if it be contained in previous conveyances in the chain of title, since if the easement is once created it accrues for the benefit of subsequent grantees. If, therefore, in such previous conveyances, restrictions have been inserted against nuisances or against the erection of a steam engine upon the premises conveyed, a subsequent grantee may be enjoined from erecting a steam engine, although no such restriction is contained in the immediate conveyance under which he derives his title.<sup>95</sup>

§ 1158. **Damage need not be shown; vendor enjoined from breach; change in adjoining lands; must result from act of covenantee.** To warrant relief by injunction in the case of a covenant restricting erections upon the premises conveyed, it is not essential that the plaintiff should show any actual damage resulting from the breach of covenant of which he complains, and if a clear breach be shown equity may interpose its preventive aid regardless of the question of damage, since the covenantee is entitled to the benefit of his covenant.<sup>96</sup> And in such a case, the purchaser having erected buildings beyond a line fixed by the covenant, it is proper to grant the injunction in a mandatory form.<sup>97</sup> So, too, the jurisdiction may be exercised to prevent the breach of negative covenants on the part of the vendor of real estate. Thus, where the vendor has covenanted in the conveyance not to erect or permit the erection of any buildings on his premises in front of those conveyed, the erection of buildings in vio-

given to this naturally *dark* picture, it is perfectly certain that this keeping of a coal yard upon any of these lots is a business offensive to the neighboring inhabitants, according to the spirit and intent of these restrictive covenants. The Vice Chancellor was therefore right in overruling the

demurrer. And the order appealed from is affirmed with costs."

<sup>95</sup> *Birdsall v. Tiemann*, 12 How. Pr., 551.

<sup>96</sup> *Lord Manners v. Johnson*, 1 Ch. D., 673; *Star Brewery Co. v. Primas*, 163 Ill., 652, 45 N. E., 145.

<sup>97</sup> *Lord Manners v. Johnson*, 1 Ch. D., 673.

lation of the terms of the agreement will be enjoined.<sup>98</sup> Where, however, the acts of the feoffer, or of those deriving their title under him, have so changed the character and condition of the adjoining lands, with reference to that conveyed, as to render the restriction in the conveyance inapplicable according to its true intent and spirit, a court of equity will not interfere by injunction to prevent a breach of the covenant, but will leave the party aggrieved to his remedy at law.<sup>99</sup> It is to be observed, however, that the reason for denying relief in such cases is to be found in some positive act or acquiescence upon the part of the covenantee or those claiming under him, of such a nature as to create an equitable estoppel against him, and that a mere change in the character or condition of the neighborhood which in no way results from, or is accompanied by, some such act or acquiescence will not deprive him of the right to injunctive relief against the breach of such a covenant.<sup>1</sup>

§ 1158 *a*. **Covenant not to erect building in neighborhood.**

A covenant, based upon a valuable consideration, by which the defendant agrees not to erect flats or tenement houses in plaintiff's immediate neighborhood, although resting in parol and purely personal, is enforceable in equity and a threatened breach of such a covenant will be enjoined owing to the

<sup>98</sup> *Hills v. Miller*, 3 Paige, 254; *St. Rep.*, 584; *Orne v. Fridenberg*, 143 Pa. St., 487, 22 Atl., 832, 24

<sup>99</sup> *Duke of Bedford v. Trustees of British Museum*, 2 Myl. & K., 552; *Am. St. Rep.*, 567. In *Knight v. S. C.*, 1 Coop. temp. Cottenham, 90; *Simmonds*, (1896) 2 Ch., 294, 65 L. J. N. S. Ch., 583, the court recognize the rule but held on the evidence that there was no such change in the neighborhood as would justify them in denying the relief.

<sup>1</sup> *Craig v. Greer*, (1899) 1 L. R. Ir., 258; *S. C.*, on appeal, *Ib.*, 282; *Star Brewery Co. v. Primas*, 163 Ill., 652, 45 N. E., 145.



inadequacy of the legal remedy to afford relief by accomplishing the purpose contemplated by the contract. And where, after the making of such an agreement, the covenantee purchases land in plaintiff's immediate neighborhood for the purpose of erecting a building contrary to the provisions of the contract, one who purchases such land from the covenantee with full knowledge of the agreement will be bound thereby and may be enjoined from erecting a building in violation of the agreement.<sup>2</sup>

§ 1159. **Diligence; laches; acquiescence.** In considering applications for relief by injunction against the breach of restrictive covenants contained in conveyances of real property, the courts require due diligence upon the part of the plaintiff seeking the relief, and laches or acquiescence on his part in the violation of the restrictive covenant will ordinarily defeat his application.<sup>3</sup> Indeed, equity requires the utmost diligence, in this class of cases, upon the part of him who invokes its preventive aid, and a slight degree of acquiescence is sufficient to defeat the application, since every relaxation which plaintiff permits in allowing erections to be made in violation of the covenant amounts, *pro tanto*, to a disaffirmance of the obligation. Where, therefore, plaintiff lies by for a period of four or five months, permitting defendants to go on with their erections in disregard of the covenant, he will be denied relief by injunction.<sup>4</sup> And where a vendor of real property takes from each of several pur-

<sup>2</sup> *Lewis v. Gollner*, 129 N. Y., 227, 29 N. E., 81, 26 Am. St. Rep., 516. In this case the court say: "No other remedy (than that of injunction) would have the dimensions or proportions of the contract purpose. Money damages could not be an accurate substitute and would merely palliate, and not redress the injury."

<sup>3</sup> *Roper v. Williams, Turn. & R.*, 18.

18; *Peek v. Matthews*, L. R. 3 Eq., 515; *Water Lot Company v. Bucks*, 5 Ga., 315; *Ocean City Assn. v. Schurch*, 57 N. J. Eq., 268, 41 Atl., 914; *Orne v. Fridenberg*, 143 Pa. St., 487, 22 Atl., 832, 24 Am. St. Rep., 567. See *Star Brewery Co. v. Primas*, 163 Ill., 652, 45 N. E., 145.

<sup>4</sup> *Roper v. Williams, Turn. & R.*, 18.

chasers a covenant that he will leave unbuilt a certain portion of the premises conveyed, he will not be permitted to enjoin a breach of this covenant by one of the purchasers when he has permitted prior purchasers to violate it without taking proceedings against them.<sup>5</sup> And, generally, whenever plaintiff stands idly by and permits the erection complained of to be made and expenses to be incurred therein, without objecting, his application for the aid of a court of equity comes too late and will not be entertained. Thus, where purchasers of real estate have bought upon condition that they are to use the land for a specific purpose and none other, they will not be restrained from using it for other purposes when plaintiff has permitted them to go on without objection and to incur large expense in the work proposed, no sufficient excuse being shown for the delay in invoking the aid of equity.<sup>6</sup> But the doctrine of acquiescence, as applied to defeat the exercise of the jurisdiction in cases of this nature, is only considered with reference to the particular covenant the breach of which it is sought to enjoin, and the right to relief by injunction is not lost by plaintiff's acquiescence in the violation of another and distinct covenant in the conveyance.<sup>7</sup>

§ 1160. **Contract of hiring and service.** When the contract is one of hiring and service, with a covenant that plaintiff, so long as he continues to perform his part of the agreement, shall not be removed, the contract is not of such a nature as to warrant an injunction to prevent defendants from removing plaintiff and thereby enforcing the contin-

<sup>5</sup> *Peek v. Matthews*, L. R. 3 Eq., 515. And the reason for the rule as applied in this case is said to lie in the fact that the covenant is for the benefit of all the purchasers, and the vendor becomes a *quasi* trustee as to them to enforce

the covenant as much against one as against the other.

<sup>6</sup> *Water Lot Company v. Bucks*, 5 Ga., 315.

<sup>7</sup> *Lattimer v. Livermore*, 72 N. Y., 174.

uance of the relation between the parties.<sup>8</sup> If, however, in addition to the element of employment or agency stipulated in the agreement, there is added the furnishing of articles for sale, with a restriction against furnishing them to other persons, a different case is presented, and a breach of such a negative covenant may be prevented in equity. Thus, where defendant contracts to furnish plaintiff with a certain medical compound and to make him his sole wholesale agent therefor, and to furnish the article to no other persons save at a specified rate, a violation of the agreement constitutes sufficient ground for relief by injunction.<sup>9</sup> So defendant, who has contracted to sell certain chattels to plaintiff for a given time and at a given price, agreeing not to sell to any other person during such time, may be restrained from a breach of the agreement.<sup>10</sup> And where plaintiff had entered into a contract by which he had purchased a large amount of stock in the defendant newspaper company and in pursuance of the contract had taken entire charge of the managing and editing of the paper at an agreed salary, and it appeared that the plaintiff had a wide reputation as a successful newspaper man which he expected to enhance as the result of this connection, an injunction was granted restraining the defendant company from violating its contract by interfering with the plaintiff's control and management of the paper.<sup>11</sup>

§ 1161. **Telegraph company; covenant against imparting information.** It is also held that where a telegraph company is incorporated for the purpose of furnishing to its subscribers information as to the quotations of stocks and other commodities, the subscribers agreeing by the terms of their

<sup>8</sup> *Stocker v. Brockelbank*, 3 Mac. & G., 250.

<sup>9</sup> *Dietrichsen v. Cabburn*, 2 Ph., 52; S. C., 1 Coop. temp. Cottenham, 72.

<sup>10</sup> *Donnell v. Bennett*, 22 Ch. D., 835.

<sup>11</sup> *Jones v. Williams*, 139 Mo., 1, 39 S. W., 486, 40 S. W., 353, 37 L. R. A., 682, 61 Am. St. Rep., 436.

contract not to sell or give to other persons the reports and information thus received, such a subscriber may be enjoined from selling or giving away the information in violation of his agreement.<sup>12</sup>

§ 1162. **Impossibility of specific performance ground for refusing injunction.** Where an agreement is of such a nature that it is practically impossible for a court to enforce it, and the bill for an injunction is in effect a bill for specific performance, equity will not interfere. Thus, where the lessee of an inn has covenanted to keep it open as an inn during the period of his lease, and not to do any act whereby the license might become forfeited, an injunction will not be allowed to restrain him from discontinuing to use and keep open the premises as an inn, no intention being shown on the part of defendant to violate the negative part of the agreement, since this would in effect be a mandatory injunction directing him to carry on the business of an inn-keeper. And in such case, it not appearing that the lessee threatens or intends any act whereby the license might become forfeited, an interlocutory injunction, granted upon filing the bill, should be dissolved.<sup>13</sup> So where defendant had contracted to take notes of cases heard and determined in court and to publish them in the form of law reports for complainant, but had failed to comply with his agreement, an injunction was refused to prevent him from making reports for persons other than the complainants.<sup>14</sup> And where complainant had entered into an agreement with a railway company to conduct its road and to keep its rolling stock in repair, the court refused to enjoin the company from employing any other person than complainant to do the work contracted, upon the ground that it was impossible

<sup>12</sup> Gold & Stock Telegraph Co. v. Todd, 17 Hun, 548.

<sup>14</sup> Clarke v. Price, 2 Wilson Ch. C., 157.

<sup>13</sup> Hooper v. Broderick, 11 Sim., 47.

from the nature of the agreement to enforce it specifically by compelling defendant to employ complainant.<sup>15</sup> So where a contract requires the performance of continuous acts or services by the defendant, equity will not enjoin the breach of a negative stipulation in the contract where to do so would require the court to assume and exercise a constant supervision over the faithful performance of the covenant.<sup>16</sup>

§ 1163. **Contracts for theatrical and operatic performances; former doctrine.** The rule as above laid down was formerly applied generally to all contracts for personal services, where from the nature of the case it was impossible to compel the contracting party to render the services. And while the result of the later authorities establishes a different doctrine, it was formerly held that, in cases of contracts for theatrical and operatic performances, a court of equity having no power to compel the performance of the acts required, would not interfere by injunction. And where complainant had agreed to sing in concerts and operas, and not to make other engagements during the period of the contract, an injunction was refused to prevent the contractor from making other engagements, the proper remedy being by proceedings at law for the violation of the contract.<sup>17</sup> So it has been held that, pending an action at law by a theatrical manager for damages resulting from the violation of a contract to play at plaintiff's theater for a given length of time, defendants will not be enjoined from playing elsewhere, nor will another manager be enjoined from contracting for their services.<sup>18</sup> And a theatrical manager has been denied an injunction to prevent an actor from playing at another theater, when by the terms of his

<sup>15</sup> Johnson v. Shrewsbury R. Co.,  
3 DeGex, M. & G., 914.

<sup>17</sup> Sanquirico v. Benedetti, 1  
Barb., 315; Burton v. Marshall, 4  
Gill, 487.

<sup>16</sup> Berliner Gramophone Co. v.  
Seaman, 49 C. C. A., 99, 110 Fed.,  
30.

<sup>18</sup> Burton v. Marshall, 4 Gill, 487.

contract he was not restricted from so doing.<sup>19</sup> So where the defendant has agreed to furnish plaintiff the use of his theater for the purpose of producing a play, an injunction was refused to enjoin defendant from giving the use of the theater to another person during the same period, since it was impossible to compel the defendant to carry out his contract according to its terms.<sup>20</sup>

§ 1164. **The later doctrine; illustrations.** But the doctrine as above stated has been much shaken, if not wholly overthrown by other and better sustained authorities. And while in cases of contracts containing both affirmative and negative stipulations the authorities are exceedingly conflicting and irreconcilable, as to whether equity may interfere by injunction to prevent a breach of the negative covenant when the affirmative is of such a nature that it can not be specifically enforced by a judicial decree, yet the later and better considered doctrine is that equity may thus interfere to restrain the violation of the negative stipulation, although it can not specifically enforce the affirmative one.<sup>21</sup> For example, where defendant, an opera singer or actor, has contracted to sing or play for plaintiff at his theater, and not

<sup>19</sup> *Caldwell v. Cline*, 8 Mart. N. S., 684.

<sup>20</sup> *Welty v. Jacobs*, 171 Ill., 624, 49 N. E., 723, 40 L. R. A., 98.

<sup>21</sup> *Lumley v. Wagner*, 1 DeGex, M. & G., 604, affirming S. C., 5 DeG., & Sm., 485, overruling *Kemble v. Kean*, 6 Sim., 333; *Kimberley v. Jennings*, 6 Sim., 340; *Daly v. Smith*, 38 N. Y. Superior Ct., 158; *Western Union T. Co. v. Union Pacific R. Co.*, 1 McCrary, 558; *Donnell v. Bennett*, 22 Ch. D., 835; *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y., 60, 51 N. E., 408, 43 L. R. A., 854, 68 Am. St. Rep., 749; *Myers v. Steel Machine*

*Co.*, — N. J. Eq., —. 57 Atl., 1080; *Harrison v. Glucose Sugar R. Co.*, 53 C. C. A., 484, 116 Fed., 304, 58 L. R. A., 915; *Philadelphia Ball Club v. Lajoie*, 202 Pa. St., 210, 51 Atl., 973, 58 L. R. A., 227, 90 Am. St. Rep., 627; *American Assn. Ball Club v. Pickett*, 8 Pa. Co. Ct., 232; *Philadelphia Ball Club v. Hallman*, 8 Pa. Co. Ct., 57; *dictum* in *Iron Age Publishing Co. v. W. U. T. Co.*, 83 Ala., 498, 3 So., 449. See, *contra*, *Hills v. Croll*, 2 Ph., 60; S. C., 1 Coop. t. Cottenham, 83. And see *Rice v. D'Arville*, 162 Mass., 559, 39 N. E., 180.

elsewhere without his permission, defendant may be enjoined from singing or acting elsewhere, the court thus preventing a breach of the negative covenant, although it can not specifically enforce the affirmative agreement by compelling defendant to sing or act for plaintiff.<sup>22</sup> So where the defendant had agreed to make printing presses for the plaintiff and to sell to plaintiff its entire output and had expressly covenanted not to make them for any other person, an injunction was granted to restrain a violation of the negative stipulation, although the affirmative agreement was not capable of being specifically enforced against the defendant.<sup>23</sup> So where defendant had entered into plaintiff's employ agreeing to devote himself to plaintiff's business and not to engage directly or indirectly in the same business for any other person during the term of the contract, a breach of the negative covenant was enjoined, although the court could not compel performance by defendant of his affirmative agreement.<sup>24</sup> So, also, where defendant had agreed, among other

<sup>22</sup> *Lumley v. Wagner*, 1 DeGex, M. & G., 604, affirming S. C., 5 DeG. & Sm., 485; *Daly v. Smith*, 38 N. Y. Superior Court, 158; S. C., 49 How. Pr., 150; *McCaul v. Braham*, 21 Blatch., 278; S. C., 16 Fed., 37. In *Lumley v. Wagner*, 1 DeGex, M. & G., 604, Lord St. Leonards, Chancellor, after reviewing the authorities, says: "The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff and the other by the defendant, \* \* \* but of an act to be done by the defendant alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant, the one being ancillary to, concurrent and operating together with the other. The

agreement to sing for the plaintiff during three months at his theater, and during that time not to sing for anybody else, is not a correlative contract; it is in effect one contract. \* \* \* The engagement to perform for three months at one theater must necessarily exclude the right to perform at the same time at another theater."

<sup>23</sup> *Myers v. Steel Machine Co.*,—N. J. Eq., —, 57 Atl., 1080.

<sup>24</sup> *Harrison v. Glucose Sugar R. Co.*, 53 C. C. A., 484, 116 Fed., 304, 58 L. R. A., 915. And see this case for the distinction between a contract for personal services with a covenant against entering the employ of any other person and a contract in restraint of trade by which one is deprived of his occupation.

things, to give plaintiff the necessary space in its store for the conduct of a department for the sale of a certain line of goods and had expressly covenanted not to sell or allow to be sold any other goods of the same line, it was held that, although the court could not compel the specific performance by defendant of the affirmative parts of the agreement, an injunction should nevertheless issue to restrain a violation of the severable negative stipulation.<sup>25</sup> So where defendant was under contract to render to plaintiff his services as a baseball player, with an agreement not to play ball for any other team during the term of the contract, a violation of the negative stipulation was enjoined, although performance of the affirmative undertaking could not be compelled.<sup>26</sup>

§ 1164 *a*. **Exceptions to rule.** The rule thus announced, clearly established as it is by the later and better authorities, is subject to certain exceptions. Thus, equity will not, by injunction, enforce a negative covenant in a contract for personal services where the plaintiff is unable to fulfill the obligation imposed upon him by the contract; and in such case, the tender by plaintiff of a bond conditioned for the fulfillment of his obligation will not suffice to excuse him.<sup>27</sup> So, also, a negative covenant in a contract for personal services which extends generally to business of any kind, as distinguished from one which is limited to services of a special nature, is regarded as unreasonable and its violation will not be enjoined.<sup>28</sup> But where the negative covenant is in a double aspect, being not to engage in a particular business or in any business in general, it will be sustained as to the

<sup>25</sup> *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y., 60, 51 N. E., 408, 43 L. R. A., 854, 68 Am. St. Rep., 749. 58 L. R. A., 227, 90 Am. St. Rep., 627.

<sup>27</sup> *Rice v. D'Arville*, 162 Mass., 559, 39 N. E., 180.

<sup>26</sup> *Philadelphia Ball Club v. La-joie*, 202 Pa. St., 210, 51 Atl., 973, 1898 1 Ch., 671. <sup>28</sup> *Ehrman v. Bartholomew*,



particular business named and a breach of the covenant by engaging for another in that occupation will be enjoined.<sup>29</sup>

§ 1164 *b*. **Implied negative covenants in contracts for personal services; conflict of authority; the English rule.** Upon the question whether an express negative covenant is essential in contracts for personal services in order to entitle the covenantee to the protection of equity, the authorities are conflicting. The earlier English cases held that the relief might be allowed, even though the contract of services or employment contained no negative or restrictive clause, if such negative element might be fairly presumed or implied. Thus, it was held that an actor who had contracted with a theatrical manager to play for a given time at a particular theater should be enjoined from acting at any other theater during the period covered by the agreement, although he had not in terms contracted against acting elsewhere, since a contract to play at a particular theater for a specified time necessarily implies a negative covenant against acting elsewhere during that period.<sup>30</sup> The result, however, of the latest English authorities has been to establish a different doctrine in that country and the rule may now be regarded there as settled that if the parties have not seen fit to incorporate into their contract a negative stipulation, the court will not incorporate such an element into the contract for them, even though it may be there by necessary implication, and accordingly, in the absence of such an express negative covenant, relief by injunction will be denied.<sup>31</sup> Following this principle, they have gone so far as to hold that the relief should be denied, even though the contract contains an ex-

<sup>29</sup> *Robinson v. Heuer*, (1898) 2 Ch., 451. *vis v. Foreman*, (1894) 3 Ch., 654. In *Metropolitan Electric S. Co. v. Ginder*, (1901) 2 Ch., 799, the

<sup>30</sup> *Montague v. Flockton*, L. R. 16 Eq., 189; *Webster v. Dillon*, 3 Jur. N. S., 432. the court, while recognizing the rule as thus laid down, distinguish between cases where the contract is

<sup>31</sup> *Whitwood Chemical Co. v. Hardman*, (1891) 2 Ch., 416; *Da-* for personal services and where it

press negative covenant, if such covenant is affirmative in substance.<sup>32</sup>

§ 1164 *c.* **The rule in this country.** In this country the courts have followed the doctrine laid down in the earlier English cases, holding that a negative covenant, if fairly or necessarily implied from the positive undertaking of the parties, is as much a part of their contract as if expressly incorporated into it, and they accordingly grant relief in such cases although the act sought to be restrained is not expressly prohibited by the contract.<sup>33</sup> The rule as laid down by the earlier English authorities and as followed in this country is undoubtedly correct upon principle and is sustained by the weight of authority in like and in analogous cases.<sup>34</sup>

§ 1164 *d.* **Remedy at law for breach of contract for personal services; nature of services.** The rule under discussion which grants equitable relief against the violation of covenants for personal services, whether express or implied, is subject to the important qualification that where the services in question are of no especial or peculiar value and are therefore of such a nature that they may be readily duplicated, relief by injunction will be denied since the injury in such case is not of an irreparable nature and the remedy at law

involves an obligation for the exclusive purchase of a chattel from a particular person, holding that in the latter case the relief may be granted if the negative stipulation may be fairly implied. And see *Burney v. Ryle*, 91 Ga., 701, 17 S. E., 986, where the court refer to the question but refuse to pass upon it.

<sup>32</sup> *Davis v. Foreman*, (1894) 3 Ch., 654. In this case defendant took complainant into his employ agreeing, among other things, that he would not require complainant

to leave his employ. This covenant, though negative in form, was held to be affirmative in substance.

<sup>33</sup> *Duff v. Russell*, 14 N. Y. Supp., 134, affirmed on memorandum opinion in 133 N. Y., 678, 31 N. E., 622; *American Assn. Ball Club v. Pickett*, 8 Pa. Co. Ct., 232. And see *Daly v. Smith*, 38 N. Y. Superior Ct., 158; *Welty v. Jacobs*, 171 Ill., 624, 49 N. E., 723, 40 L. R. A., 98.

<sup>34</sup> See, *ante*, §§ 1134 *a* and 1151 *a*.

affords adequate redress for any injury which the plaintiff may sustain by reason of the breach of the contract.<sup>35</sup> Thus, the relief has been denied where defendant was employed in the capacity of a lithographic designer,<sup>36</sup> or of an advertising solicitor,<sup>37</sup> or of an agent and manager.<sup>38</sup> And in such case, the proper test is whether or not a substitute can be readily obtained and employed.<sup>39</sup> But it is not necessary, in order to entitle the covenantee to the aid of equity, that it should be impossible to replace defendant's services, if they are of such a unique character and display such a special knowledge and skill as to render them of especial and peculiar value to the employer.<sup>40</sup>

§ 1165. **Negative agreement distinct from affirmative.** If the negative and affirmative parts of the contract are entirely separate and distinct, the court may enjoin a breach of the negative covenant upon a bill seeking that relief only, regardless of the affirmative undertaking. Thus, where it is contracted with complainant that one of two persons shall not carry on the business of a tailor within a certain locality, the remaining portion of the contract being that the other of the two persons shall be employed by complainant in his business so long as it shall be carried on, upon a bill seeking only to restrain the breach of the negative stipulation, an injunction may be allowed.<sup>41</sup>

<sup>35</sup> *Strowbridge L. Co. v. Crane*, 504, 21 N. Y. Supp., 314, affirmed 12 N. Y. Supp., 898; *Johnston Co. v. Hunt*, 66 Hun, 504, 21 N. Y. Supp., 314, affirmed in 142 N. Y., 621, 37 N. E., 564; *Burney v. Ryle*, 91 Ga., 701, 17 S. E., 986; *Rogers Mfg. Co. v. Rogers*, 58 Conn., 356, 20 Atl., 467, 7 L. R. A., 779, 18 Am. St. Rep., 278; *Chain Belt Co. v. Von Spreckelsen*, 117 Wis., 106, 94 N. W., 78.

<sup>36</sup> *Strowbridge L. Co. v. Crane*, 12 N. Y. Supp., 898.

<sup>37</sup> *Johnston Co. v. Hunt*, 66 Hun,

<sup>38</sup> *Rogers Mfg. Co. v. Rogers*, 58 Conn., 356, 20 Atl., 467, 7 L. R. A., 779, 18 Am. St. Rep., 278.

<sup>39</sup> *Strowbridge L. Co. v. Crane*, 12 N. Y. Supp., 898; *Burney v. Ryle*, 91 Ga., 701, 17 S. E., 986.

<sup>40</sup> *Philadelphia Ball Club v. LaJoie*, 202 Pa. St., 210, 51 Atl., 973, 58 L. R. A., 227, 90 Am. St. Rep., 627.

<sup>41</sup> *Rolfe v. Rolfe*, 15 Sim., 88; *S. C.*, 1 Coop. t. Cottenham, 87.

In such case the negative agreement is entirely distinct and separable from the affirmative, there being in effect two distinct contracts, and relief is sought only against a violation of the negative stipulation.<sup>42</sup>

§ 1166. **Purely negative contract; partners; jurisdiction of court.** Where the contract, to restrain the violation of which an injunction is sought, is purely a negative contract, unconnected with any affirmative stipulations, relief may be properly granted, especially where the agreement is between partners and is for the benefit of the partnership business. Thus, where one of several partners in a theater covenants with the other partners that he will not write plays for any other theater, but does not agree to write for the theater belonging to the firm, he may be enjoined from violating such agreement.<sup>43</sup> And it is held that the jurisdiction to restrain the breach of a negative agreement, or a promise to abstain from doing a particular thing, is not limited to cases where the court has jurisdiction over the acts of complainant.<sup>44</sup> Nor is it material whether the right sought to be protected is at law, or under an agreement which can not otherwise be brought within the jurisdiction of equity, provided the bill states a right in the person complaining to the performance of a negative agreement of the defendant.<sup>45</sup>

<sup>42</sup> See also *Hopner v. Brodrigg*,  
1 Coop. t. Cottenham, 89.

<sup>43</sup> *Morris v. Colman*, 18 Ves., 437.

<sup>44</sup> *Dietrichsen v. Cabburn*, 2 Ph.,  
52.

<sup>45</sup> *Dietrichsen v. Cabburn*, 2 Ph.,  
52.

## . IV. CONTRACTS IN RESTRAINT OF TRADE.

- § 1167. General rule.
1168. Grounds of the jurisdiction; illustrations; relief denied where covenant too broad.
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1178. Contract must be certain and violation clear.
1179. Consideration; interest; court can not determine adequacy of consideration.
1180. What must be shown by bill.
1181. Covenants against publication.
1182. Plaintiff not allowed both injunction and damages.
1183. Assignee of notes for purchase money, when enjoined.
- 1183a. Exclusive agreement between city and water company protected.
- 1183b. Stranger to contract not enjoined.
- 1183c. Injunctions under Sherman anti-trust act.

§ 1167. **General rule.** The extent to which courts of equity may interfere by injunction to restrain the breach of contracts in total or partial restraint of trade has given rise to not a little conflict of authority, and the effect of the later decisions has not been to settle this conflict to any considerable degree. The law upon this subject may be said to have undergone three distinct stages of transition or development. The earlier doctrine of the English courts regarded all contracts restricting one in the exercise of his

trade or profession as contrary to public policy and void, whether the restriction was total or partial. The second or intermediate stage was that in which the courts, while still holding contracts in general restraint of trade to be void, yet recognized the validity of such agreements when the restraint was only partial, being limited as to the conditions of time and space, reasonable in its nature and founded upon sufficient consideration; and in such cases relief by injunction has been freely granted to prevent a breach of the undertaking.<sup>1</sup> The great majority of cases arising at the present day are of this class and the rule which allows injunctive relief in such cases is still one of frequent application. The third and what may be termed the existing state of the law as deduced from the latest English and American authorities is that which recognizes and enforces covenants of this nature, even though the restraint is general throughout an entire state or country, provided it is founded upon a sufficient consideration and is not unreasonable in view of the nature and extent of the business of the covenantee. Disregarding the reasons for the stringency of the early English doctrine, which had its origin in the insular condition of that country and in the

1 Butler v. Burleson, 16 Vt., 176; McClurg's Appeal, 58 Pa. St., 51; Whittaker v. Howe, 3 Beav., 383; Morris v. Colman, 18 Ves., 437; Rolfe v. Rolfe, 15 Sim., 88; S. C., 1 Coop. t. Cottenham, 87; Nicholls v. Stretton, 7 Beav., 42; Hubbard v. Miller, 27 Mich., 15; Beal v. Chase, 31 Mich., 490; Baumgarten v. Broadway, 77 N. C., 8; Williams v. Williams, 2 Swanst., 253; Baker v. Pottmeyer, 75 Ind., 451; Smith's Appeal, 113 Pa. St., 579, 6 Atl., 251; Gill v. Ferris, 82 Mo., 156; Bailey v. Collins, 59 N. H., 459; Richardson v. Peacock, 33 N. J. Eq., 597; Finger v. Hahn, 42 N. J. Eq., 606, 8 Atl., 654; Brewer v. Lamar, 69 Ga., 656; Rogers v. Maddocks, (1892) 3 Ch., 346; Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn., 230, 91 N. W., 892; McCurry v. Gibson, 108 Ala., 451, 18 So., 806, 54 Am. St. Rep., 177; Brown v. Kling, 101 Cal., 295, 35 Pac., 995; Hursen v. Gavin, 162 Ill., 377, 44 N. E., 735; Downing v. Lewis, 56 Neb., 386, 76 N. W., 900; American Fisheries Co. v. Lennen, 118 Fed., 869. And see Oregon S. N. Co. v. Winsor, 20 Wal., 64.

limited extent of business transactions, the present tendency of the courts is to construe and to enforce such contracts with reference to the wider scope and area of business enterprises as extended by the agencies of steam and electricity in modern times. If, therefore, the restrictive covenant is no broader than the nature and necessities of the business in question and affords no more than a reasonable protection to the covenantee, the courts now freely extend relief by injunction, even though in many cases the covenant is not limited in area.<sup>2</sup> There are, however, respectable authorities which hold that a restraint as broad as the United States or even a state, although it may be fairly and reasonably necessary for the protection of the covenantee, is nevertheless invalid and unenforceable; these decisions being based upon considerations of public policy which require that contracts which tend so strongly to create a monopoly should not be enforced.<sup>3</sup>

- <sup>2</sup> *Nordenfelt v. Maxim N. G. & A. Co.*, App. Cas. (1894), 535; *Whittaker v. Howe*, 3 Beav., 383; *Ainsworth v. Bentley*, 14 Weekly Rep., 630; *Hagg v. Darley*, 47 L. J. R. N. S. Ch., 567; *Leather Cloth Co. v. Lorsche*, 39 L. J. N. S. Eq., 80; *Rousillon v. Rousillon*, 14 Ch. D., 351; *Mills v. Dunham*, (1891) 1 Ch., 576; *Badische Anilin & Soda Fabrik v. Schott*, (1892) 3 Ch., 447; *Underwood v. Barker*, 68 L. J. N. S. Ch., 201; *Morse T. D. & M. Co. v. Morse*, 103 Mass., 73; *Anchor Electric Co. v. Hawks*, 171 Mass., 101, 50 N. E., 509, 41 L. R. A., 189, 68 Am. St. Rep., 403; *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. Superior Court, 442; *Diamond Match Co. v. Roeber*, 106 N. Y., 473, 13 N. E., 419; *Herreshoff v. Boutineau*, 17 R. I., 3, 19 Atl., 712, 8 L. R. A., 469, 33 Am. St. Rep., 850; *Oakdale Mfg. Co. v. Garst*, 18 R. I., 484, 28 Atl., 973, 23 L. R. A., 639; *Harrison v. Glucose Sugar R. Co.*, 53 C. C. A., 484, 116 Fed., 304, 58 L. R. A., 915; *Tode v. Gross*, 127 N. Y., 480, 28 N. E., 469, 13 L. R. A., 652 (an action at law). See *Albright v. Teas*, 37 N. J. Eq., 171; *Gamewell F. A. T. Co. v. Crane*, 160 Mass., 50, 35 N. E., 98, 22 L. R. A., 673; *Kramer v. Old*, 119 N. C., 1, 25 S. E., 813, 34 L. R. A., 389, 56 Am. St. Rep., 650.
- <sup>3</sup> *Lufkin Rule Co. v. Fringeli*, 57 Ohio St., 596, 49 N. E., 1030, 41 L. R. A., 185, 63 Am. St. Rep., 736; *Lanzit v. Sefton Mfg. Co.*, 184 Ill., 326, 56 N. E., 393, 75 Am. St. Rep., 171; *Union Strawboard Co. v. Bonfield*, 193 Ill., 420, 61 N. E., 1038

§ 1168. **Grounds of the jurisdiction; illustrations; relief denied where covenant too broad.** The jurisdiction in cases of this nature is based upon the ground that the parties can not be placed *in statu quo*, and that damages at law can afford no adequate compensation, the injury being a continuous one and irreparable by the ordinary process of courts of law.<sup>4</sup> Where the restrictive covenant is limited both as to time and territory, the courts have almost uniformly enforced the restriction, and most of the reported cases will be found to fall within this class, although, as will be seen, the relief is now freely granted where no territorial limits are prescribed. As illustrating the former class of cases it is held that contracts between physicians, whereby one is

(an action at law); *Allsopp v. Wheatcroft*, 42 L. J. N. S. Ch., 12; *Berlin Machine Works v. Perry*, 71 Wis., 495, 38 N. W., 82; *Western Wooden Ware Association v. Starkey*, 84 Mich., 76, 47 N. W., 604, 11 L. R. A., 503. That state lines should not be thus arbitrarily adopted for the test as to the legality of contracts in restraint of trade, see *Harrison v. Glucose Sugar R. Co.*, 53 C. C. A., 484, 116 Fed., 304, 58 L. R. A., 915, where *Jenkins, J.*, says: "State lines cannot justly be applied within reason to the rule. \* \* \* The reasonableness of the restraint has respect to the territory occupied by the business. That which would be reasonable in respect of one trade would be unreasonable in respect of another. Each case must be resolved upon its peculiar circumstances." In *Hursen v. Gavin*, 162 Ill., 377, 44 N. E., 735, the court lay down the rule that a contract which is only in partial restraint of trade is valid if it is

reasonable, and that the restraint is reasonable when it affords only a fair protection to the party in whose favor it is imposed. In *Lanzit v. Sefton Mfg. Co. and Union Strawboard Co. v. Bonfield*, *supra*, they modify this rule to the extent of holding that if the contract extends to the limits of the entire state, it is invalid even though it may appear to be not unreasonable when considered with reference to the business of the covenantee and the benefits intended to be secured to him. In *McCurry v. Gibson*, 108 Ala., 451, 18 So., 806, 54 Am. St. Rep., 177, the court say that the test as to the reasonableness of the restraint is whether it affords only a fair protection to the interests of the covenantee without being so extensive in its operation as to interfere with the public interest.

<sup>4</sup> *Stovall v. McCutcheon*, 107 Ky., 577, 54 S. W., 969, 92 Am. St. Rep., 373.



restricted from the exercise of his profession within a prescribed area, upon sufficient consideration, as for example a sale of the good-will of the business, will be enforced by enjoining any attempt at the exercise of the profession within the locality specified.<sup>5</sup> And where defendant, on being articulated as a clerk to complainant, who was an attorney at law, covenanted that he would not interfere with complainant's clients, or act for them in the capacity of attorney, he was restrained from a breach of his covenant.<sup>6</sup> So where

<sup>5</sup> McClurg's Appeal, 58 Pa. St., 51; *Ligare v. Semple*, 32 Mich., 462; *McCurry v. Gibson*, 108 Ala., 451, 18 So., 806, 54 Am. St. Rep., 177; *Cole v. Edwards*, 93 Iowa, 477, 61 N. W., 940; *Pickett v. Green*, 120 Ind., 584, 22 N. E., 737; *Butler v. Burleson*, 16 Vt., 176. In the latter case, the following observations of the court very clearly illustrate the grounds upon which the interference is based: "When there is an express covenant and an uncontroverted mischief arising from the breach of it, equity will grant an injunction to restrain the breach. In this case there is an express contract. The mischief arising from the breach of it can not be repaired, nor can it well be estimated. A suit at law would afford no adequate remedy, and the damages will be continuing and accruing from day to day; and furthermore, the object of the contract can only be obtained by the parties conforming expressly and exactly to its terms." Injunction sustained.

<sup>6</sup> *Nicholls v. Stretton*, 7 Beav., 42. This was a case where defendant, on being articulated as a clerk to

complainant, an attorney, covenanted that he would not in any way interfere with or be concerned as attorney, or otherwise, for any of complainant's clients or correspondents, upon pain of forfeiting the sum of one hundred pounds for every breach of the covenant. The defendant, having acted as attorney for certain parties who had been clients of complainant, a bill was filed praying a perpetual injunction against such intermeddling in violation of the terms of the agreement. Lord Langdale, Master of the Rolls, although conceding that the enforcement of the terms of a negative contract might possibly work injury to third parties in such a case, sustained the jurisdiction as follows: "In all cases of this kind, where an injunction is asked to restrain a party from exercising his professional employment, the court has always had some reluctance in acting, for not only is it, to some extent, a restriction on trade, but it may also have the effect of depriving third parties of the services of those in whom alone they may have confidence. The question has arisen not only in the case of so-

partners were engaged in the business of running coaches between two different points, and defendant sold his interest in the business to plaintiff, with a condition that he would not at any time run a coach between the points, or in any manner injure plaintiff's business, an interlocutory injunction was allowed to prevent a violation of the covenant.<sup>7</sup> So where defendant sold to plaintiff a medicinal compound, agreeing never to use or to permit his name to be used on any preparation which could be sold for the same purpose, a violation of the agreement was held to warrant an injunction.<sup>8</sup> So also where defendant agreed that in the event of the termination of his employment with the plaintiffs, he would not transact any business with any person who, during the continuance of the contract, was a customer of the plaintiffs, the covenant was construed to mean a business of the same kind as that transacted by plaintiffs, and an injunction was granted restraining a violation of the agreement.<sup>9</sup> So a contract by which certain merchants

licitors, but in that of medical men. There was a case before Lord Eldon, of a medical man who had covenanted not to be employed for certain persons, and those persons being taken ill, it was a case of great hardship to say that he should not attend them. It must be admitted that this court can not interfere in these cases without the possibility of injury to third parties. That difficulty, however, has been passed over, and the court has repeatedly exercised its jurisdiction in cases of this nature. It is no answer to say, in this case, that the client would not have employed the plaintiff in the particular case referred to. Any interference with his clients was one of

the very things which the plaintiff, when he took the defendant into his office, was desirous of guarding against. I do not see any ground on which I can say that this is a contract which this court will not enforce. The perseverance of Stretton in acting in this manner and in availing himself of the introduction he accidentally acquired in the plaintiff's office has made this application necessary. I must grant this injunction; the only question is, as to the terms in which it should be expressed."

<sup>7</sup> Williams v. Williams, 2 Swanst., 253.

<sup>8</sup> Brewer v. Lamar, 69 Ga., 656.

<sup>9</sup> Mills v. Dunham, (1891) 1 Ch., 576.

agree among themselves to close their places of business at an earlier hour than usual during certain specified months of the year, being only a partial and very slight restraint of trade, is valid and binding, and its violation may be restrained by injunction.<sup>10</sup> But where the restraint imposed by the contract is unreasonably extensive, being broader than necessary for the fair and proper protection of the business of the covenantee, it will be regarded as void and relief by injunction against the violation of such a covenant will be denied. Thus, a covenant extending to the entire state, except one city was held to be too broad as applied to the business of peddling oil and gasoline by horse and wagon.<sup>11</sup> So the limits of the state in connection with the business of teaching certain foreign languages were held to be greater than the necessities of the business required and relief was accordingly denied.<sup>12</sup> So a covenant imposing a restriction throughout the United States was held to be too broad where it did not appear that the plaintiff was doing business in all of the states or that his business was co-extensive with the limits of the United States.<sup>13</sup> And where a physician purchases the office and good-will of another, the vendor agreeing not to resume practice in the same city, a breach of the agreement will not be restrained when it is not shown that plaintiff has sustained any injury.<sup>14</sup>

§ 1168 *a*. **Relief granted although covenant indefinite or unlimited in time.** Upon the question whether a contract

<sup>10</sup> *Stovall v. McCutcheon*, 107 Ky., 577, 54 S. W., 969, 92 Am. St. Rep., 373.

<sup>11</sup> *Consumers Oil Co. v. Nunne-maker*, 142 Ind., 560, 41 N. E., 1048, 51 Am. St. Rep., 193.

<sup>12</sup> *Herreshoff v. Boutineau*, 17 R. I., 3, 19 Atl., 712, 8 L. R. A., 469, 33 Am. St. Rep., 850.

<sup>13</sup> *Mallinckrodt Chemical Works*

*v. Nemnisch*, 169 Mo., 388, 69 S. W., 355, affirming and adopting the opinion of the court in S. C., 83 Mo. App., 6.

<sup>14</sup> *Thayer v. Younge*, 86 Ind., 259. And see this case and also *Ryan v. Hamilton*, 205 Ill., 191, 68 N. E., 781, as to adequacy of consideration for contracts in restraint of trade.

in restraint of trade which is indefinite or unlimited as to time is thereby rendered invalid, while the earlier cases were not entirely harmonious, the rule is now well established that if the restraint imposed by the contract be not in other respects unreasonable, it is no objection that such restraint is, in the proper case, to continue for an indefinite or unlimited period, and that fact constitutes no ground for denying equitable relief against a breach of the agreement.<sup>15</sup> This is but an application of the fundamental test which has been almost universally adopted, that if the restriction, either as to time or place, is no more than is fairly and reasonably necessary for the proper protection of the covenantee, it will be recognized and enforced by the courts.

§ 1169. **Restrictive covenant not implied.** Some conflict of authority exists upon the question whether, in the absence of an express agreement against resuming business in a given locality upon the sale of a business with its good-will, equity

<sup>15</sup> *Kramer v. Old*, 119 N. C., 1, 25 S. E., 813, 34 L. R. A., 389, 56 Am. St. Rep., 650; *French v. Parker*, 16 R. I., 219, 14 Atl., 870, 27 Am. St. Rep., 733; *Up River Ice Co. v. Denler*, 114 Mich., 296, 72 N. W., 157, 68 Am. St. Rep., 480; *Martin v. Murphy*, 129 Ind., 464, 28 N. E., 1118; *O'Neal v. Hines*, 145 Ind., 32, 43 N. E., 946; *Ryan v. Hamilton*, 205 Ill., 191, 68 N. E., 781; *Swanson v. Kirby*, 98 Ga., 586, 26 S. E., 71; *Jefferson v. Markert*, 112 Ga., 498, 37 S. E., 758; *Cole v. Edwards*, 93 Iowa, 477, 61 N. W., 940; *Richardson v. Emmert*, 44 Kan., 262, 24 Pac., 478; *Pohlman v. Dawson*, 63 Kan., 471, 65 Pac., 689, 54 L. R. A., 913, 88 Am. St. Rep., 249; *Welsh v. Morris*, 81 Tex., 159, 16 S. W., 744, 26 Am. St. Rep., 801; *Haynes v. Doman*, (1899) 2 Ch., 13.

And see *Oakdale Mfg. Co. v. Garst*, 18 R. I., 484, 28 Atl., 973, 23 L. R. A., 639. In *Mandeville v. Harman*, 42 N. J. Eq., 185, 7 Atl., 37, it was held that a covenant by which the defendant, who was employed as an assistant by a physician and surgeon, agreed in consideration of such employment never to engage in the practice of medicine or surgery in the same city, was an unreasonable restriction upon the defendant in excess of that which was necessary for the proper protection of the covenantee, and the relief was accordingly denied. See *French v. Parker*, *supra*, for the attempted distinction between a contract involving the sale of the good-will of a trade and one in which the defendant agrees not to engage in a learned profession.

should interfere by injunction to prevent defendant from so resuming. The better doctrine, however, is that to warrant a court of equity in interfering by injunction in such cases, there must be an actual contract, and the court will not imply a covenant on the part of one who sells the good-will of a trade or business not to carry on the same trade in that locality. It follows, therefore, that where one has sold the good-will of his trade, without any express covenant preventing him from resuming the trade in that vicinity, he will not be enjoined from resuming it.<sup>16</sup> And where upon the evidence it is doubtful whether the parties at the time

<sup>16</sup> *Cruttwell v. Lye*, 17 Ves., 335; *Shackle v. Baker*, 14 Ves., 468; *Kennedy v. Lee*, 3 Meriv., 441; *Churton v. Douglas, Johns.*, 174. And see *Bradford v. Peckham*, 9 R. I., 250; *Stephens v. Aulls*, 3 Thomp. & C., 781; *Ranft v. Reimers*, 200 Ill., 386, 65 N. E., 720, 60 L. R. A., 291. See, *contra*, *Dwight v. Hamilton*, 113 Mass., 175; *Ginesi v. Cooper*, 14 Ch. D., 596. In *Kennedy v. Lee*, 3 Meriv., 441, Lord Eldon was of opinion that upon a contract of sale by one partner to another, in the absence of any express or negative agreement or prohibition, the purchaser seeking an injunction and a receiver was not entitled "to claim any good-will in the trade in addition to the partnership property which is the subject of it, except what is the necessary effect of his acquiring the sole ownership in the property—certainly not so much as to preclude the defendant from carrying on the same trade where, and when, and with whom he pleases." So in *Churton v. Douglas, Johns.*, 174, Vice Chancellor Wood ob-

serves, p. 187: "The authorities, I think, are conclusive upon this point, that the sale of the good-will of a business, without more, does not imply a contract on the part of the vendor not to set up again a similar business himself. I use the expression similar business purposely, in order to distinguish the case I am supposing from one where, as here, the vendor seeks to set up again the identical business which he has professed to sell. Upon the sale of the good-will of a business, the vendor is not precluded from carrying on a precisely similar business with all the advantages he may be able to acquire from his own industry and labor, and from the regard people may have for him; and that in a place next door, for example, to the very place where the former business was carried on. And upon the authorities it is settled that if the purchaser wishes to prevent that step from being taken, it is his fault if he does not take care to insert provisions to that effect in the deed."

of the sale had any distinct agreement or understanding that defendant should not resume the same business in opposition to plaintiff at the same place or within a given distance therefrom, it was held that the contract sought to be established was not of such a nature as to be aided by any intendment, and that the bill seeking to enjoin defendant from carrying on the business within the given limits should be dismissed, but without prejudice to plaintiff's right to sue at law.<sup>17</sup> So where defendants had sold a millinery business to plaintiff, who insisted upon a covenant that they would not carry on or permit another person to carry on the same business within a given locality for ten years, and would do their best to procure customers for plaintiff and to assist him, but defendants declined to give such covenant, which was then waived by plaintiff upon the mere undertaking of defendants, upon a bill seeking an injunction upon the ground that defendants were encouraging another person to undertake a rival business and recommending customers to such person, an interlocutory injunction was refused before answer to restrain proceedings at law under a judgment recovered, leaving the parties to their remedy at law for damages.<sup>18</sup> And where one sells the good-will of a business he is not, in the absence of express contract, prevented from leasing premises which he may own in the same neighborhood to another person who may carry on the same business, provided there is no collusion between the parties and the lessor has no interest in the business. Equity will not, therefore, under such circumstances, interfere by injunction to prevent such lessee from conducting the business.<sup>19</sup> In Massachusetts, however, it is held that upon the

<sup>17</sup> *Stephens v. Aulls*, 3 Thomp. & C., 781.

<sup>18</sup> *Shackle v. Baker*, 14 Ves., 468. "I can not," says Lord Eldon, "see my way to grant an injunction in this case. If it had been nothing

more than a purchase of the good-will of this trade, the vendor would be at liberty to set up the same trade in any other situation."

<sup>19</sup> *Bradford v. Peckham*, 9 R. 1, 250.

sale of a business and good-will there is an implied covenant, as in other sales, that the vendor will do nothing to disturb the vendee in the possession of his purchase. And where a physician sold to another his real estate, practice and the good-will of his business, it was held that an injunction would lie to prevent the vendor from resuming practice as a physician in the same town.<sup>20</sup>

§ 1170. **Written contract not necessary; express limitation as to place not essential; limiting or extending covenant by construction.** It is not necessary, however, that the contract should be in writing to entitle it to the protection of equity, and where one has sold the lease of a house with the good-will of the business connected therewith, and has agreed orally that he will not renew the business in that street, he may be enjoined from violating such oral agreement.<sup>21</sup> So where plaintiff, a teacher, is induced to purchase of defendant, also a teacher, the lease of an academy upon the representations of the latter that he will quit the business of teaching, defendant may be enjoined from opening another school in that locality, since there can be no adequate remedy at law for the injury thus sustained.<sup>22</sup> Nor is it necessary that the contract should contain any express limitation as to the place or extent of territory over which the restriction shall extend; and if from all the circumstances of the case it is manifest that it was the intention of the parties that it should be limited to the town or locality in which the business had been previously carried on, the contract will be so construed, and equity will enjoin defendant from continuing the business in that locality.<sup>23</sup> But where the parties

<sup>20</sup> *Dwight v. Hamilton*, 113 Mass., 175.

<sup>21</sup> *Harrison v. Gardner*, 2 Madd., 198. See, as to the effect of a parol agreement not to engage in a rival business in the same city, made contemporaneously with the exe-

cution of a written lease, *Welz v. Rhodius*, 87 Ind., 1.

<sup>22</sup> *Spier v. Lambdin*, 45 Ga., 319.

<sup>23</sup> *Hubbard v. Miller*, 27 Mich., 15; *Moore & H. H. Co. v. Towers Hardware Co.*, 87 Ala., 206, 6 So., 41, 13 Am. St. Rep., 23. In the

have expressly provided in their contract a territorial limitation which is void because broader than necessary for the reasonable protection of the covenantee, but have named no narrower limits as to which it may be sustained, the contract is to be regarded as indivisible and it will therefore not be sustained to such a limited territorial extent as may be necessary for the fair protection of the plaintiff. In such case, since the parties themselves have not seen fit to inject into their contract the element of divisibility, the court will not do so for them and relief will therefore be denied *in toto*.<sup>24</sup> But where defendant, in selling out his interest in the good-will of a medical practice, had agreed not

latter case, the court limited the contract by construction to the northern part of the state, which was the territory covered by the previous competition of the parties. In *Up River Ice Co. v. Denler*, 114 Mich., 296, 72 N. W., 157, 68 Am. St. Rep., 480, where defendant had agreed not to engage in the ice business in a certain city or adjacent thereto, an injunction was granted restraining him from engaging in the prohibited business within the city and in any adjacent territory which might reasonably be reached for the delivery of ice by plaintiff's teams and wagons.

<sup>24</sup> *Mallinckrodt Chemical Works v. Nemisch*, 169 Mo., 388, 69 S. W., 355, affirming and adopting the opinion in S. C., 83 Mo. App., 6. In this case the Appellate Court say: "(It is contended by complainant that) while the contract as applied to the whole of the United States may be void, yet it may be applied to a particular part or parts of the territory of the

Union and be held valid. This might be done, if the 6th clause of the contract had specifically mentioned the states of Missouri and Illinois and disjoined them from the territory of the United States as a whole, but it is not so written in the contract; the space mentioned in the contract is not divided, the parties did not choose to divide it, and what they did not do the court cannot do for them, but must construe the contract as the parties made it; courts cannot make contracts for parties, nor make that divisible which the parties have made indivisible. \* \* \* If a selection of territory is to be made to make the contract valid, then the defendant has as much right to make the selection as the plaintiff. To make such a selection, it would be necessary for the parties to come together and make a new contract. When this is done the plaintiff may have a contract that is enforceable. The present one is not."



to practice in a certain town, and it appeared that the business in the town was of little value, while outside it was quite lucrative, the court construed the covenant to include the town and vicinity, and an injunction was accordingly granted restraining defendants from violating the covenant in that form.<sup>25</sup>

§ 1171. **Sale of printing establishment; corporation enjoined; when not enjoined.** Where one had sold a printing establishment and business, with the copyright of a valuable receipt book published by him, together with the good-will of the business and the right to the vendee to use the vendor's name therein, and had covenanted not to resume the business within the state while vendee should continue therein at the place in question, an injunction was granted to restrain the vendor from engaging directly or indirectly in the printing business in the state and from printing such receipt book.<sup>26</sup> So where the vendors of a business, who had agreed not to engage in the same business in the vicinity of a certain city, have formed a corporation in which they owned a controlling interest and of which they were the officers, directors and principal stockholders, they were held to have violated the spirit if not the letter of their covenant and were accordingly enjoined from engaging, taking stock or assisting in the organization of a corporation formed for the purpose of thus violating their agreement.<sup>27</sup> And the vendor having formed a corporation for the purpose of conducting his new business, and the other incorporators having been advised of such contract, the corporation was also enjoined from conducting the business with or for the vendor.<sup>28</sup> But where it does not appear that the incorporators have organized for the purpose and with the intention of evading their contract

<sup>25</sup> *Cole v. Edwards*, 93 Iowa, 477, S. E., 813, 34 L. R. A., 389, 56 Am. 61 N. W., 940. St. Rep., 650.

<sup>26</sup> *Beal v. Chase*, 31 Mich., 490.

<sup>28</sup> *Beal v. Chase*, 31 Mich., 490.

<sup>27</sup> *Kramer v. Old*, 119 N. C., 1, 25

or that they have reserved any interest in the business distinct from their interest as stockholders, the relief should not be extended against the corporation.<sup>29</sup>

§ 1171 *a*. **Vendor enjoined from soliciting customers of old business; use of telephone number.** Where the owner of a trade or business sells it out to the plaintiff, together with the good-will, an implied obligation arises upon the part of the vendor not to injure or interfere with such good-will by actively soliciting the trade of the patrons of the business. While, therefore, the vendor will not, in the absence of an express agreement, be enjoined from re-engaging in the same trade,<sup>30</sup> an injunction will nevertheless lie to restrain him from canvassing among those who were customers of the business at the time of the sale and from attempting to secure their patronage or to induce them to cease dealing with the plaintiff.<sup>31</sup> And upon the sale of the good-will of a business it has been held proper to restrain the vendor from appropriating the telephone number which had been used in the business sold and by which a large number of the orders of the business had been accustomed to be given.<sup>32</sup> But where the owner of a business who has sold out the good-will to a corporation afterwards enters the employ of the corporation, he will not, upon leaving its employ and engaging in the same trade, be enjoined from holding himself out as having been formerly connected with the corporation.<sup>33</sup>

<sup>29</sup> *Moore & H. H. Co. v. Towers Hardware Co.*, 87 Ala., 206, 6 So., 41, 13 Am. St. Rep., 23. And see *Kramer v. Old*, 119 N. C., 1, 25 S. E., 813, 34 L. R. A., 389, 56 Am. St. Rep., 650.

<sup>30</sup> § 1169, *supra*.

<sup>31</sup> *Trego v. Hunt*, App. Cas. (1896), 7, approving *Labouchere v. Dawson*, L. R. 13 Eq., 322, and overruling *Pearson v. Pearson*, 27

Ch. D., 145; *Ranft v. Reimers*, 200 Ill., 386, 65 N. E., 720, 60 L. R. A., 291; *Myers v. Kalamazoo Buggy Co.*, 54 Mich., 215, 19 N. W., 961, 20 N. W., 545; *dicta* in *Richardson v. Peacock*, 6 Stew. Eq., 597, and in *Newark Coal Co. v. Spangler*, 54 N. J. Eq., 354, 34 Atl., 932.

<sup>32</sup> *Ranft v. Reimers*, 200 Ill., 386, 65 N. E., 720, 60 L. R. A., 291.

<sup>33</sup> *Newark Coal Co. v. Spangler*,

§ 1172. **Manner of resuming business immaterial; injunction on behalf of assignee.** The manner in which the vendor carries on the business in violation of his covenant is immaterial, provided it be in fact the business which he has contracted not to resume. And when defendant sells his business and good-will to plaintiff, covenanting that he will not within a given time resume the business at a specified place, if under the pretense of selling upon commission for other parties he engages in a business which is within the spirit of the covenant, a fitting case is presented for extending the aid of an injunction.<sup>34</sup> And where one has sold his business with an agreement not to re-engage in the same trade at a specified place for a given time, and the covenantee subsequently assigns the contract, relief against a violation of the covenant will be granted upon behalf of the assignee.<sup>35</sup>

§ 1173. **Illustrations of the relief.** Where one sells his premises, together with the fixtures and good-will of his business, and as part of the consideration for the purchase of the good-will he covenants not to carry on the business at a specified place, the purchaser agreeing to employ him, he may be enjoined from setting up business in violation of his covenant, even though he has been discharged from the purchaser's employ and the evidence does not clearly show that he was properly dismissed.<sup>36</sup> And the fact that defendant is employed upon a salary by a third person conducting the business prohibited by the contract will not prevent the grant-

54 N. J. Eq., 354, 34 Atl., 932. And see this case to the effect that one who has sold out the good-will of a business will, upon re-engaging in the same trade, be enjoined from holding himself out as the one who formerly carried on such business. But see *Pearson v. Pearson*, 27 Ch. D., 145; *Trego v. Hunt*, App. Cas. (1896), 7, 20.

<sup>34</sup> *Richardson v. Peacock*, 11 C. E. Green, 40; S. C., 28 N. J. Eq., 151, 33 N. J. Eq., 597.

<sup>35</sup> *Swanson v. Kirby*, 98 Ga., 586, 26 S. E., 71; *American Fisheries Co. v. Lennen*, 118 Fed., 869.

<sup>36</sup> *Daggett v. Ryman*, 17 L. T. N. S., 486.

ing of relief by injunction.<sup>37</sup> Thus, where a tailor, upon the sale of his business, good-will and fixtures, covenants not to carry on or be interested or concerned in the same business within an area of five miles from the former location, he will be enjoined from working as a journeyman upon a salary, in the employ of a nephew of the same name and conducting the same business, within a quarter of a mile of the old location.<sup>38</sup>

§ 1174. **Relief in cases of unlimited restriction; illustrations.** It remains to consider the later modification of the general doctrine under discussion as shown in the more recent cases in which relief by injunction has been granted against the breach of covenants in restraint of trade, although the restriction may have extended over an entire country, or even been unlimited as to territorial extent. The governing principle in this class of cases is, that, although contracts in restraint of trade may be bad upon grounds of public policy, unless they are natural and reasonable for the protection of the parties dealing with the subject-matter of the contract, and although public policy requires that the citizen should not deprive himself or the state of his skill or talent, yet one who has a commodity to sell should be permitted to sell it most advantageously in the market by precluding himself from entering into any competition with the purchaser. And the restriction against future competition, however unlimited as to territory, may be upheld and enforced if no broader than is necessary to afford reasonable protection to the business of the covenantee. Thus, where the owner of letters patent for the manufacture of a valuable article of commerce sells his patents to a company incorporated for carrying on the manufacture of the article, and covenants not to carry

<sup>37</sup> *Newling v. Dobell*, 19 L. T. N. S., 408; *Finger v. Hahn*, 42 N. J. S., 408. *Eq.*, 606, 8 Atl., 654. <sup>38</sup> *Newling v. Dobell*, 19 L. T. N.

on or allow to be carried on in any part of Europe any manufacture or sale of productions similar to those which were the subject of the patents, and not to communicate to any one the processes of the manufacture in such a manner as to interfere with the exclusive enjoyment of the benefits purchased, the covenant is one capable of being enforced in equity, and its breach will be prevented by injunction.<sup>39</sup> So an attorney and solicitor, who sells his busi-

<sup>39</sup> *Leather Cloth Company v. Lortson*, 39 L. J. N. S. Eq., 86. The principles underlying the jurisdiction of equity for the protection of contracts in restraint of trade are clearly stated in this case by James, Vice Chancellor, as follows: “\* \* \* The truth is that all the cases, when they come to be examined, according to my view of it, establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties dealing legally with some subject-matter of contract, and that the principle is this: public policy requires that every man should be at liberty to work for himself, and should not be at liberty to deprive himself or the state of his labor, skill or talent by any contract that he enters into. On the other hand, public policy requires this: that where a man has by skill or any other means obtained something which he wants to sell, he should be able to sell it in the most advantageous way in the market, and in order to enable him to sell it advantageously in the market it is necessary that he should be able to

preclude himself from entering into competition with the purchaser, that then the same public policy which enables him to do that, does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction in the judgment of the court is not unreasonable, having regard to the subject-matter of the contract. Now in this case the subject-matter of the contract was a particular manufacture, carried on partly under patents and partly by processes which were known to the vendors, and it is to be assumed not known except to the vendors themselves and their agents and workmen. That being the subject-matter of the contract, the stipulation is that the vendor will not set up a similar manufacture in Europe, and will not communicate the process of the manufacture anywhere so as to interfere with the exclusive enjoyment by the intended company of the benefits thereby agreed to be purchased. It seems to me that the case much more resembles, having regard to these facts, the sale of a secret (which has been held to be

ness to a new firm, covenanting for a valuable consideration that he will not resume practice within a period of twenty years in any part of the country, and will not induce any

perfectly good), and as connected with the sale of that secret an unlimited stipulation as to time or place as to communicating the secret or dealing with it so as to interfere with the purchaser, because in truth there were particular processes for the manufacture; those processes were to be communicated, and they were to be communicated for the exclusive benefit of the purchaser. It is settled by authority that a man may bind himself not to communicate that process to anybody else; that he should not communicate that secret anywhere under any circumstances in any part of the world to anybody. But how would it be possible to enforce such a covenant as that not to communicate the process, if he were at the same time to be at liberty to carry on that same trade with the same processes in such a way that they would have to be communicated to every servant and workman engaged by him in the trade? Therefore, the mere fact that he is entitled to restrain himself simply amounts to this: it is not that he is restrained, but that he is entitled to restrain himself from communicating, and is thereby enabled to get a higher price for that which he is selling. The fact that he is so entitled to restrain himself from communicating the process entitles him also to restrain himself from carrying on a manufacture which

would involve the communication of the process. Therefore, independently of those words, 'so as in any way to interfere with the exclusive enjoyment,' I am of opinion that there is nothing in this covenant which violates the rules of law or which is in contravention of the decided cases, when the principles upon which these cases have been decided come to be properly considered. But if there were anything in the covenant so standing which might be supposed to be in contravention of some of the decided cases, I am satisfied myself that those words, 'so as in any way to interfere with the exclusive enjoyment of the company,' do properly and sufficiently modify and qualify it; the principle being that you are not to have any more restraint than is necessary for the benefit of the company, and in order to obviate any objection you must not do it so as to interfere; that is for the company to say; we do not ask for any unreasonable restraint, for any capricious restraint upon you; we only ask you to tie yourself up not to do something which will interfere with that which you profess to sell to us, and for which you have received a consideration. Therefore, I am of opinion that the plaintiffs are right in saying that the covenant is one capable of being enforced in this court. Then the next question is, has the defendant, Lorsont, been doing any-

of the clients of the old firm to withhold their business from the new, may be enjoined from violating the agreement.<sup>40</sup> And where the defendant, upon selling his business, covenants with the purchaser, its successors and assigns, that he will not within ninety-nine years engage in the same business within any of the several states and territories of the United States, excepting Nevada and Montana, a breach of the covenant may be enjoined, the covenant affording a reasonable protection to plaintiff coextensive with its business.<sup>41</sup> So a covenant by an employee of plain-

thing which is in violation of that covenant? I am of the opinion that he is doing so; that he is engaged in a manufactory for the manufacture of productions similar to those which were the subject of letters patent, and which were then manufactured in the manufactory so carried on at West Ham at the time of the contract; that is to say, it was proved to me that the particular production is the production of an article known as Crockett's leather cloth; that Crockett's leather cloth was manufactured at West Ham at that time; that Crockett's leather cloth, called by that very name, is manufactured by the defendant and sold by him under that very name, with an advertisement from him to the effect that the goods supplied by him are in every respect similar to those made by the Crockett International Leather Cloth Company while the works were 'under my management,' and then he states his sixteen years experience, and so on. That is to say, having covenanted that he would not be engaged in the manufacture of products similar to

those which were then being made, he circulates to the world a letter saying: 'I am now actually making productions which are in every respect similar to those which were made by the vendors and afterwards made by the purchaser.' I am of opinion, therefore, that the plaintiffs are entitled to an injunction. The injunction, I think, ought to be in these words, the only evidence given before me being with regard to Crockett's leather cloth: 'To restrain the defendant from carrying on any manufactory for the production of Crockett's leather cloth, or being engaged in any company for the sale of Crockett's leather cloth, or any production similar thereto, and from in any manner holding himself out as the manufacturer of such Crockett's leather cloth, or any production similar thereto.' This is the whole extent to which I purpose granting the injunction."

<sup>40</sup> *Whittaker v. Howe*, 3 Beav., 383.

<sup>41</sup> *Diamond Match Co. v. Roeber*, 106 N. Y., 473, 13 N. E., 419. And see the opinion of the court in this

tiffs who were wine merchants, not to engage in the wine business for a given period after leaving their employ, was sustained and its breach was enjoined, although the restriction was unlimited territorially and the injunction in effect prevented defendant from resuming the business throughout Great Britain and the continent of Europe.<sup>42</sup> So where the owner of letters patent covering the manufacture of quick-firing guns sold the patents and the business covered by them to a corporation, agreeing neither directly nor indirectly for a period of twenty-five years to engage in any business which would be liable to compete with that sold to the corporation, the covenant, although unlimited as to area, was held reasonably necessary for the fair and proper protection of the covenantee since the only customers were to be found among the governments of the world, and a breach

case for an exhaustive review of the entire subject, with the reasons for the relaxation of the earlier English doctrine. Much of the uncertainty and want of harmony in the reported cases will be found to be the result of a *dictum* of Chief Justice Parker, afterward Lord Macclesfield, in *Mitchel v. Reynolds*, 1 P. Wms., 181, in which the court pronounce all contracts in general restraint of trade void, although the case was one of partial restraint, the restriction being confined to a single parish in London and although the validity of the contract was sustained.

<sup>42</sup> *Rousillon v. Rousillon*, 14 Ch. D., 351. Says Mr. Justice Fry in this case, p. 356: "The question of extent is really a question of reasonableness, and the reasonableness must vary with the facility of the means of communication.

If a trade is carried on over a wide extent, either through a whole country, or through a whole continent, there is nothing unreasonable in the restraint being equally extensive." And in *Morse T. D. & M. Co. v. Morse*, 103 Mass., 73; *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. Superior Court, 442; *Hagg v. Darley*, 47 L. J. R. N. S. Ch., 567, the contracts were upheld and the right to enjoin their breach was sustained, although the restriction was unlimited as to territory, the courts regarding the protection sought as not unreasonable in view of the extent and necessities of the business of the plaintiffs. But see, *contra*, *Allsopp v. Wheatcroft*, 42 L. J. N. S. Ch., 12; *Berlin Machine Works v. Perry*, 71 Wis., 495, 38 N. W., 82.



of the covenant was therefore restrained by injunction.<sup>43</sup> So where defendant, upon being taken into plaintiff's employ, agreed that in the event of the termination of the employment, he would not at any time call upon, directly or indirectly solicit orders from, or in any way deal or transact business with, any person or firm who, during the continuance of the agreement, might be customers of the plaintiff, the covenant was held valid although unlimited both in time and in area, and an injunction was accordingly granted.<sup>44</sup> So, in general, where defendant agrees that in the event of the termination of his employment with the plaintiff, he will not re-engage in any similar or competing business, the covenant will be sustained although general and unlimited in extent, and relief by injunction will be granted to restrain its violation.<sup>45</sup> And the relief, in this class of cases, is freely granted for the protection of purchasers who have succeeded to the rights of the original covenantee.<sup>46</sup>

§ 1175. **Liquidated damages.** Contracts of the class under consideration frequently contain stipulations that, in the event of a breach of the undertaking not to resume the given trade or business, a fixed sum may be recovered as liquidated damages; and it has sometimes been urged that covenants of this nature were a bar to relief by injunction in equity, and that redress should be had by an action at law to recover the stipulated damages. The test, however, to be applied in all such cases seems to be that of the intention of the parties, and if it is apparent from the contract as an entirety that the restriction against resuming the business in question was not intended to be satisfied by the payment of the

<sup>43</sup> *Nordenfelt v. Maxim N. G. & Anchor Electric Co. v. Hawks*, 171 A. Co., App. Cas. (1894), 535. Mass., 101, 50 N. E., 509, 41 L. R.

<sup>44</sup> *Mills v. Dunham*, (1891) 1 A., 189, 68 Am. St. Rep., 403. Ch., 576.

<sup>45</sup> *Diamond Match Co. v. Roeber*,

<sup>46</sup> *Badische Anilin & Soda Fabrik v. Schott*, (1892) 3 Ch., 447; 106 N. Y., 473, 13 N. E., 419; *Morgan v. Perhamus*, 36 Ohio St., 517.

sum named as liquidated damages, equity may still enjoin a breach of the agreement. In other words, if it is apparent from the contract that the intention of the parties was, not that immunity from the restriction might be purchased by payment of the penalty, but that they only intended to liquidate the damages in the event of a breach of the undertaking, relief by injunction may still be properly allowed.<sup>47</sup> Upon the other hand, if the contract by which defendant agrees not to engage in a specified business contains a provision that he may nevertheless do so upon the payment of a stipulated sum, the payment of such sum releases him from further obligation under his covenant and relief will therefore be denied.<sup>48</sup>

§ 1176. **Resuming business in employ of third person.** A merchant who, upon selling his stock in trade and business, covenants not to carry on the same business at the same place, or within certain limits surrounding, and who thereupon gives up his place of business, will not be enjoined from afterward soliciting and procuring orders within the specified territory, the question of whether this constitutes a breach of the covenant being regarded as too doubtful to warrant an injunction without bringing an action.<sup>49</sup> And where one undertakes the management of the business of a chemist, covenanting against carrying on the same business in his own name and for his own benefit, or

<sup>47</sup> Howard v. Woodward, 10 Jur. N. S., 1123; Diamond Match Co. v. Roeber, 106 N. Y., 473, 13 N. E., 419; National Provincial Bank v. Marshall, 40 Ch. D., 112; London & Yorkshire Bank v. Pritt, 56 L. J. R. N. S. Ch., 987; McCurry v. Gibson, 108 Ala., 451, 18 So., 806, 54 Am. St. Rep., 177. See also § 1139, *ante*, and cases cited. But see, *contra*, Stafford v. Shortreed, 62 Iowa, 524, 17 N. W., 756; Martin v. Murphy, 129 Ind., 464, 28 N. E., 1118, where the court held that the plaintiff should sue at law to recover the stipulated damages. See also Up River Ice Co. v. Denler, 114 Mich., 296, 72 N. W., 157, 68 Am. St. Rep., 480.

<sup>48</sup> Dills v. Doeblner, 62 Conn., 366, 26 Atl., 398, 20 L. R. A., 432, 36 Am. St. Rep., 345.

<sup>49</sup> Turner v. Evans, 2 DeGex, M. and G., 740.

in the name and for the benefit of any other person, within a certain radius, under a specified penalty secured by bond, and he afterward solicits orders for another chemist within the limits specified, the effect of such conduct upon the covenant in question is regarded as too doubtful to warrant a preliminary injunction.<sup>50</sup> So where one sells his business, agreeing not to carry it on in the same place, either in his own name or in the name of other persons, for a period of five years, and during this period he acts as manager for another person engaged in the same business and in the same place, the question is regarded as too doubtful to be dealt with on an application for an interlocutory injunction.<sup>51</sup> And a covenant against engaging in a certain trade, or in any matter pertaining thereto, within a certain district, is not regarded as violated by loaning money to one engaged in such business, the loan being secured by mortgage upon the business premises, even though the covenantor may know that the mortgagor's only means of repaying the money is out of the profits of the business.<sup>52</sup> But where the defendant sold a barber shop to the plaintiff agreeing not to engage in the barber business, he was enjoined from afterwards resuming the business in the employ of a third person, it appearing that the contract was very comprehensive and that defendant's acts were a clear violation of its terms.<sup>53</sup> And where the covenantee, a woman engaged in the millinery business, sold it to plaintiff agreeing never to enter into or become interested in any manner in the same business in a specified town, the covenant was held to be violated by the establishment of a millinery business which was carried on in the name of the covenantor's husband and

<sup>50</sup> *Clerk v. Watkins*, 9 Jur. N. S., 142.

<sup>51</sup> *Allen v. Taylor*, 18 W. R., 888; S. C., 22 L. T. N. S., 651.

<sup>52</sup> *Bird v. Lake*, 1 Hem. & M., 338.

<sup>53</sup> *Pohlman v. Dawson*, 63 Kan., 471, 65 Pac., 689, 54 L. R. A., 913, 88 Am. St. Rep., 249.

by means of his money but in which the covenantee herself had an interest and by which she was benefited.<sup>54</sup> But in such case the husband should not be enjoined from carrying on the business since the contract between his wife and the plaintiff, being to some extent against public policy, should not be extended by construction or implication.<sup>55</sup>

§ 1177. **Acting as manager for another.** Where, however, one agrees that he will not directly or indirectly, either alone or in partnership with or with the assistance of any other person, set up or follow or practice a particular business, he is regarded as violating his covenant by conducting the business in the capacity of assistant or manager to another person.<sup>56</sup> So where defendant demises to plaintiff a shop and covenants that he will not at any time during the term carry on or be concerned in carrying on, either directly or indirectly, a particular business within a given distance from the town, the acting as manager for another in conducting the particular trade is such a violation of the covenant as to warrant an injunction.<sup>57</sup> So where defendant, in selling out his business, agrees not to engage in the same business, he will not be permitted to violate his contract under the pretext of working as agent for another engaged in the same business, of which he becomes the exclusive manager and the success of which depends entirely upon his ability and skill of management, and relief will be granted restraining him from thus violating his covenant.<sup>58</sup>

§ 1178. **Contract must be certain and violation clear.** While it is thus apparent that the jurisdiction of equity is well established to prevent by injunction the violation of a covenant, made upon sufficient consideration, not to

<sup>54</sup> *Richardson v. Emmert*, 44 Kan., 262, 24 Pac., 478.

<sup>55</sup> *Emmert v. Richardson*, 44 Kan., 268, 24 Pac., 480.

<sup>57</sup> *Jones v. Heavens*, 4 Ch. D., 636.

<sup>58</sup> *Jefferson v. Markert*, 112 Ga., 498, 37 S. E., 758.

<sup>56</sup> *Dales v. Webster*, 18 W. R., 993.

engage in a particular business within a given locality, yet the contract itself must be certain and distinct, or such as from the surrounding circumstances may be construed with certainty. And an agreement by defendants to "never tow vessels in competition" with plaintiffs is not sufficiently definite or certain to warrant an injunction against its violation.<sup>59</sup> The alleged violation of the contract must also be clear and well established, and when the question of violation is involved in doubt, and no injury is shown to have been done to plaintiff which can not be compensated in damages, the court will refuse to interfere.<sup>60</sup> So where a business is carried on for a term of years by a receiver, a purchaser of the business can not enjoin such receiver from soliciting orders from and doing business with the customers, in the absence of any contract imposing such a restriction.<sup>61</sup>

§ 1179. **Consideration; interest; court can not determine adequacy of consideration.** It is also to be borne in mind with reference to the exercise of the jurisdiction under discussion, that relief by injunction is allowed only when there is a sufficient consideration for the contract, and when the plaintiff himself has a legal interest in the contract. Where, therefore, a member of an incorporated company sells his stock, with a covenant not to carry on the business in which the corporation is engaged for a specified time and within a given locality, the corporation will not be allowed to enjoin a violation of the contract, the consideration for the sale not having come from the corporation and it not being a party to the contract.<sup>62</sup> So an interlocutory injunction is properly denied where there appears to be a question as to whether the restriction of the covenant is not too broad as including the entire United States and where it also appears that the

<sup>59</sup> *Caswell v. Gibbs*, 33 Mich., 331.

<sup>61</sup> *In re Irish*, 40 Ch. D., 49.

<sup>60</sup> *Harkinson's Appeal*, 78 Pa. St., 196.

<sup>62</sup> *Onondaga Co. Milk Association v. Wall*, 17 Hun, 494.

agreement is not based upon a consideration which would support it in equity.<sup>63</sup> But while the covenant, in order to be enforceable in equity, must be based upon a sufficient consideration, it is for the parties to the contract and not for the court to determine the adequacy of that consideration.<sup>64</sup>

§ 1180. **What must be shown by bill.** When defendant upon the sale of his business contracts as part of the consideration that he will not resume the same business in the same town, without the purchaser's consent, and the purchaser seeks to enjoin an alleged violation of the contract, the injunction will not be allowed when the bill does not show a continuance or repetition of the alleged breach of the contract, and when it does not appear that plaintiffs at the time of commencing suit were themselves in the business in question.<sup>65</sup> Plaintiff must also show a full compliance on his part with the terms of the contract, and failing to show this an injunction will be refused.<sup>66</sup>

§ 1181. **Covenants against publication.** A covenant on the part of a publisher that he will not publish in future a particular magazine is considered in the same light as a covenant by one selling a particular trade or business, that he will not again engage in that trade or business, and is not void as a general contract in restraint of trade. But the injunction in such case will be confined to restricting the publication of the particular magazine specified.<sup>67</sup> And it is to be observed that the jurisdiction in restraint of breaches of negative contracts is not confined to the contracting parties, but may be extended to third parties with notice of the covenant. Thus, where an author assigns the copyright of a work pub-

<sup>63</sup> *American Preservers Co. v. Norris*, 43 Fed., 711.

<sup>64</sup> *Ryan v. Hamilton*, 205 Ill., 191, 68 N. E., 781; *McCurry v. Gibson*, 108 Ala., 451, 18 So., 806, 54 Am. St. Rep., 177.

<sup>65</sup> *Berger v. Armstrong*, 41 Iowa, 447.

<sup>66</sup> *Hollis v. Shaffer*, 38 Kan., 492, 17 Pac., 86.

<sup>67</sup> *Ainsworth v. Bentley*, 14 W. R., 630.

lished in his name, covenanting not to publish any work prejudicial to the sale of the first, a publisher who, with notice of such covenant, afterwards publishes a work from the same author, in the same name and upon the same subject, will be enjoined, although the latter work may not be an actual piracy, and although it is published under a different title.<sup>68</sup> But where plaintiff and defendant are partners in the publication of a journal, and defendant, the retiring partner, sells his interest to plaintiff, covenanting not to be connected with any newspaper or publication of that kind within the limits of a particular county so long as plaintiff shall own or control an interest in the journal in question, the acts of plaintiff in representing by printed circulars and by verbal statements that he has sold his interest and has no further connection with the journal, or with its management, will operate as an estoppel to prevent him from enjoining the publication by defendant of a similar paper.<sup>69</sup>

§ 1182. **Plaintiff not allowed both injunction and damages.** One who is aggrieved by the violation of a contract in restraint of trade of the nature under consideration will not be allowed both legal and equitable relief at the same time. And where a motion for an injunction to restrain the breach of such an agreement is ordered to stand over, with leave to complainant to proceed at law, and he recovers liquidated damages in an action at law, he will not be allowed an injunction to restrain the further breach of the agreement.<sup>70</sup> Upon similar principles, where an action at law is instituted to recover a penalty as liquidated damages for the violation of a covenant made by a surgeon not to resume practice within a certain district, an injunction will not at the same time be granted to prevent him

<sup>68</sup> *Barfield v. Nicholson*, 2 L. J. Ch., 90; S. C., 2 Sim. & St., 1.

<sup>70</sup> *Sainter v. Ferguson*, 1 Mac. & G., 286.

<sup>69</sup> *Talcott v. Brackett*, 5 Bradw.,

from practicing in such district.<sup>71</sup> And if, after obtaining an injunction against the breach of an agreement, the party aggrieved brings an action at law for damages, the injunction may be dissolved on the application of defendant.<sup>72</sup>

§ 1183. **Assignee of notes for purchase money, when enjoined.** Where two joint owners or partners dissolve, and the retiring partner sells his interest and the good-will of the business to the other, taking notes for the purchase money secured by mortgage upon the property sold, and agreeing not to engage in the same business at that place for a given length of time, or if he does so engage, that he will pay the purchaser a specified sum, greater than the amount of the notes, as liquidated damages, and will allow the same to be set off against the notes, a violation of the agreement by resuming the business is regarded as sufficient ground for enjoining an assignee of the notes from prosecuting an action to obtain possession of the property mortgaged as security for such purchase money.<sup>73</sup>

§ 1183 *a*. **Exclusive agreement between city and water company protected.** Where a city, having full authority for so doing, has contracted with a water company for a supply of water, covenanting not to grant to any other persons the right to lay pipes and to supply the city or its inhabitants, upon the faith of which agreement the company has made large expenditures in the construction and operation of its works, the city may be enjoined from violating its covenant by granting like privileges to others.<sup>74</sup> And where a city has granted to a water company the right to lay and maintain its pipes for a period of years in the streets of the city and has covenanted, under certain conditions, not to become interested in any water works except those of the

<sup>71</sup> *Carnes v. Nesbitt*, 7 H. & N., 158; *Mayall v. Higbey*, 1 H. & C., 148.

<sup>72</sup> *Fox v. Scard*, 33 Beav., 327.

<sup>73</sup> *Spicer v. Hoop*, 51 Ind., 365.

<sup>74</sup> *Atlantic City W. W. Co. v. Atlantic City*, 39 N. J. Eq., 367.



plaintiff, an injunction will lie to restrain the city from proceeding under an ordinance to construct a system of water works in violation of its agreement with the plaintiff.<sup>75</sup>

§ 1183 *b*. **Stranger to contract not enjoined.** Where one sells out part of his stock in trade to the plaintiff, agreeing not to engage in a particular business in the locality for a period of years, and subsequently sells the balance of the stock to the defendant who gave his notes for the purchase money secured by a mortgage upon the goods sold, the latter, not being a party to the contract, can not be enjoined from engaging in the business forbidden by the contract.<sup>76</sup>

§ 1183 *c*. **Injunctions under Sherman anti-trust act.** The first section of the act of Congress of July 2, 1890,<sup>77</sup> commonly known as the Sherman anti-trust law, makes illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations." It further prescribes penalties for its violation. By the fourth section it is provided that the circuit courts of the United States shall have jurisdiction to enjoin violations of the act and that it shall be the duty of the district-attorneys in their respective districts, under the direction of the attorney-general, to institute proceedings in equity to prevent and restrain such violations. This act is construed to apply to common carriers by railroad. It is further held that the act is broad enough in its terms to include all contracts or combinations in restraint of trade, and that it was not the intention of Congress that it should be limited to such contracts or combinations only as were in unreasonable restraint of trade and were there-

<sup>75</sup> *Walla Walla v. Walla Walla Water Co.*, 172 U. S., 1, 19 Sup. Ct. Rep., 77.

<sup>76</sup> *Reeves & Co. v. Sprague*, 114 N. C., 647, 19 S. E., 707.

<sup>77</sup> 26 Stat., 209, c. 647; 3 U. S.

Comp. Stat. 1901, p. 3200. The constitutionality of the act was sustained in *United States v. Joint Traffic Association*, 171 U. S., 505, 19 Sup. Ct. Rep., 25, 43 L. Ed., 259.

fore illegal at common law. Accordingly an injunction was granted upon behalf of the United States against a number of competing railroads restraining them from carrying into effect an agreement into which they had entered for the purpose of establishing and maintaining certain rates and fares for the interstate transportation of freight and passengers, where the necessary effect of such agreement was to restrain trade and commerce between the states, even though it might appear that the rates were no more than reasonable.<sup>78</sup> So the act is held to prohibit all private contracts entered into between citizens or corporations, where the direct and immediate result of the contract or combination is necessarily to impose a restraint upon interstate commerce in respect to articles manufactured by any of the parties to the contract to be transported beyond the state in which they are made; and an injunction was accordingly allowed upon behalf of the United States to enjoin the parties to such a contract from combining together for the purpose of carrying the agreement into effect.<sup>79</sup> And the prohibition of the act applies to a combination between two parallel and competing lines of railroad engaged in the interstate transportation of freight, in pursuance of which a corporation is organized under the laws of another state for the purpose of acquiring and holding as custodian the stock of such roads, and of exercising the control and management of the constituent roads, the stockholders of the latter to receive in return for their stock so deposited shares of the holding corporation at an agreed basis of value. Such an agreement,

<sup>78</sup> *United States v. Trans-Missouri Freight Association*, 166 U. S., 290, 17 Sup. Ct. Rep., 540, 41 L. Ed., 1007, reversing S. C., 7 C. C. A., 15, 58 Fed., 58, 19 U. S. App., 36, which affirmed S. C., 53 Fed., 440; *United States v. Joint Traffic Association*, 171 U. S., 505,

19 Sup. Ct. Rep., 25, 43 L. Ed., 259.

<sup>79</sup> *Addyston Pipe & Steel Co. v. United States*, 175 U. S., 211, 20 Sup. Ct. Rep., 96, 44 L. Ed., 136, affirming S. C., 29 C. C. A., 141, 85 Fed., 271, 54 U. S. App., 723, which reversed S. C., 78 Fed., 712.

being a combination in restraint of trade and commerce between the states, falls within the prohibition of the act, and an injunction was therefore granted restraining the holding corporation, its officers and agents, from exercising the powers vested in them by the acquisition and ownership of the stock of the constituent companies.<sup>80</sup> But the act in question, in so far as it authorizes direct proceedings in equity to enjoin violations of its provisions, limits such proceedings to actions instituted, under the fourth section of the act, by the district-attorneys in the name of the United States, thus securing its enforcement, so far as direct proceedings in equity are concerned, by some general plan operating uniformly throughout the country. Accordingly a state can not maintain a bill in equity in a federal court to restrain a violation of the act, although it is alleged that the decrease in competition resulting from the illegal combination complained of will lessen the value of property owned by the state and will increase the cost of maintenance of public institutions.<sup>81</sup>

<sup>80</sup> *Northern Securities Co. v. United States*, 193 U. S., 197, 24 Sup. Ct. Rep., 436, affirming S. C., 120 Fed., 720. For other actions for injunctions under the act in question, see *United States v. Knight Co.*, 156 U. S., 1, 15 Sup. Ct. Rep., 249; *Hopkins v. United States*, 171 U. S., 578, 19 Sup. Ct. Rep., 40; *Anderson v. United States*, 171 U. S., 604, 19 Sup. Ct. Rep., 50; *Swift & Co. v. United States*, 196 U. S., 375, 25 Sup. Ct. Rep., 276; *Chesapeake & Ohio Fuel Co. v. United States*, 53 C. C. A., 256, 115 Fed., 610. For injunctions under the act in cases of strikes, see *post*, § 1415*g*.

<sup>81</sup> *Minnesota v. Northern Securities Co.*, 194 U. S., 48, 24 Sup. Ct. Rep., 598, reversing S. C., 123 Fed., 692.

## CHAPTER XX.

### OF INJUNCTIONS PERTAINING TO PRIVATE CORPORATIONS.

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#### I. GOVERNING PRINCIPLES.

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§ 1184. **Jurisdiction founded in trust; fraud, averments of.**  
The jurisdiction of equity to control or restrain the operations of corporate bodies, while exercised upon the same general principles which govern in other cases, may not inap-

propriately be considered as a branch of the general jurisdiction of courts of equity over the subject of trusts. And unless a breach of trust can be satisfactorily established, an injunction will rarely be allowed to restrain the application of corporate property or funds to other than corporate purposes.<sup>1</sup> Where, however, the existence of a trust is established, or corporate property is affected by a trust, equity will interfere for its enforcement and for the protection of the rights of members of the corporation.<sup>2</sup> And the right of any member of a corporate body to invoke the aid of equity to prevent a breach of trust by the majority of the members may be regarded as well established.<sup>3</sup> To warrant a court of equity in interfering with the proceedings of an incorporated company in the construction of its works two things must concur; first, it must appear that the company is transcending its charter; and second, that the interposition of equity is necessary to prevent an injury which can not be adequately compensated in damages at law.<sup>4</sup> And while fraud constitutes strong ground for invoking the aid of equity in restraint of the action of corporate bodies, relief by injunction will not be allowed upon mere general averments in the bill of complainant's belief of collusive and corrupt conduct. It must either appear from the bill itself that the proceedings sought to be enjoined are void, or particular acts of fraud or *prima facie* evidence of collusion must be shown and must be positively sworn to.<sup>5</sup>

<sup>1</sup> *Evan v. Avon*, 29 Beav., 144; *Attorney-General v. Carmarthen*, Cooper, 30.

<sup>2</sup> *Wiswell v. First Congregational Church*, 14 Ohio St., 31; *Dummer v. Chippenham*, 14 Ves., 245; *Attorney-General v. Mayor*, 1 Bligh N. S., 312.

<sup>3</sup> *Wiswell v. First Congregational Church*, 14 Ohio St., 31.

<sup>4</sup> *James River Co. v. Anderson*, 12 Leigh, 278; *Gartside v. East St.*

*Louis*, 43 Ill., 47. As to the right to enjoin a telegraph company from condemning a right of way over and upon a bridge crossing a navigable river, see *Chicago & A. B. Co. v. Pacific M. T. Co.*, 36 Kan., 113, 12 Pac., 535; *Pacific M. T. Co. v. Chicago & A. B. Co.*, 36 Kan., 118, 12 Pac., 560.

<sup>5</sup> *Champlin v. Mayor*, 3 Paige, 573.

§ 1185. **Jurisdiction cautiously exercised.** Especial caution is observed by courts of equity in granting injunctions whose effect would be to interfere with or suspend the operations of important public works which are being carried on by corporations. The power of granting injunctions being one of the extraordinary powers of equity, its improper exercise in cases of public works would be productive of serious injury. The jurisdiction in such cases should therefore be exercised only for the prevention of irreparable mischief, or where the injury complained of is so great and the risk so imminent that no prudent man would think of incurring it.<sup>6</sup> And equity will not interfere by injunction with the statutory powers of a corporation, such as a canal company, at the suit of an adjacent property owner who has sustained no injury which can not be otherwise redressed.<sup>7</sup> Nor should the court interfere where the right of the party complaining is doubtful, or where an action at law or in chancery, prosecuted in the ordinary mode, will afford adequate redress.<sup>8</sup> And an injunction to restrain the operations of a large company or corporation should rarely be granted without notice, on account of the mischief which might otherwise ensue. It is held, however, that a court of equity may properly exercise its discretion in such cases, and the fact that the writ has been allowed without notice is not of itself sufficient to warrant a dissolution, even though the chancellor might have exercised the discretion differently from the master who granted the injunction.<sup>9</sup>

§ 1186. **Discretion of corporate bodies rarely interfered with.** Courts of equity rarely interfere with the exercise of discretionary powers by corporate bodies or their officers, to whom such powers are confided.<sup>10</sup> And it is a well established prin-

<sup>6</sup> *Stewart v. Little Miami R. Co.*, 14 Ohio, 353.

<sup>7</sup> *Ware v. Regents Canal Co.*, 3 DeGex & J., 212.

<sup>8</sup> *Stewart v. Little Miami R. Co.*, 14 Ohio, 353.

<sup>9</sup> *Ross v. Elizabeth R. Co.*, 1 Green Ch., 422; *Carpner v. Flemington Mining Co.*, 2 Green Ch., 467; *Perkins v. Collins*, *Ib.*, 482.

<sup>10</sup> *Attorney-General v. Foundling Hospital*, 4 Bro. C. C., 165.

ciple of equity, that where acts requiring the exercise of judgment, science and professional skill are confided to the discretion of the officers of a corporation, the exercise of that discretion will not be lightly disturbed, nor will such officers be enjoined, except when abusing their power to the injury of others.<sup>11</sup> Thus, equity will not interfere by injunction with the discretionary power of a board of canal commissioners in regulating the quantity of water necessary for canal purposes, upon the complaint of persons claiming an interest in the water.<sup>12</sup> Complainants in such case, through whose land the canal passes, have no such vested right as authorizes them to interfere with the discretionary power reposed in the proper officers.<sup>13</sup> And in a controverted question as to the expediency of the location of a railway, where the decision has been confided to the professional judgment and skill of the officers of the corporation, equity will not restrain them in the exercise of that discretion, upon the application of a person not otherwise affected or injured than by the actual location passing through his land.<sup>14</sup> It is to be observed, however, that the discretion of all public agents, especially in the appropriation of private property for public uses, must be brought to the test of legal judgment, and equity may enjoin when in the exercise of that discretion such public agents overstep the conditions necessary for the public welfare.<sup>15</sup>

§ 1187. **Continuing trespass ground for relief.** Where a corporation of a *quasi* public nature, as a canal company, is about to do a permanent injury to private property, under the pretext of improving its works, the act, although a trespass in its nature, being a continuous one, will warrant the interposition of equity. Under such circumstances the trespass itself is aggravated by the abuse of authority by the officers and agents

<sup>11</sup> Walker v. Mad River R. Co., 8 Ohio, 38; Cooper v. Williams, 4 Ohio, 253.

<sup>12</sup> Cooper v. Williams, 4 Ohio, 253.

<sup>13</sup> Id.

<sup>14</sup> Walker v. Mad River R. Co., 8 Ohio, 38.

<sup>15</sup> Cooper v. Williams, 4 Ohio, 253.

of the corporation, under color of their office, and such official oppression affords strong ground for the exercise of the extraordinary power of equity through the writ of injunction.<sup>16</sup> Nor in such case will a court of equity require so strong a showing of irreparable injury before granting the relief as is required to justify an injunction against private persons.<sup>17</sup>

§ 1188. **Questions concerning chartered rights not considered in equity.** In connection with the general subject of the interference of equity to restrain the abuse of corporate powers, it is to be observed that questions concerning the possession or forfeiture of chartered rights belong exclusively to courts of law, and are not cognizable in equity. Hence an injunction will not be allowed against the operations of a banking corporation on the ground that its affairs are being so conducted as to work a forfeiture of its chartered rights.<sup>18</sup> And upon a bill to enjoin a railway company from proceedings to condemn land for its right of way, a court of equity will not consider questions relating to the fraudulent organization of the corporation, and such alleged frauds afford no ground for an injunction in such case; since if there has been an abuse or misuser of the corporate franchise, it can only be taken advantage of in a direct proceeding by the state for that purpose, and can not be inquired into in a proceeding for an injunction.<sup>19</sup> Nor is the exercise of banking privileges, without authority, a nuisance which calls for the restraining power of a court of equity, even though it is alleged that the bank is insolvent, and is buying up its own paper at a discount.<sup>20</sup>

<sup>16</sup> Ryan *v.* Brown, 18 Mich., 212. And see Osborn *v.* United States Bank, 9 Wheat., 738.

<sup>17</sup> Ryan *v.* Brown, 18 Mich., 212.

<sup>18</sup> Attorney-General *v.* Bank of Niagara, Hopk. Ch., 354.

<sup>19</sup> New Central Coal Co. *v.* Georges Creek Coal & Iron Co., 37 Md., 537; National Docks R. Co. *v.* Cen-

tral R. Co., 32 N. J. Eq., 755, reversing S. C. *sub nom.* Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq., 475; West Jersey R. Co. *v.* Cape May & S. L. R. Co., 34 N. J. Eq., 164. See also Shippen *v.* Paul, 34 N. J. Eq., 314.

<sup>20</sup> Attorney-General *v.* Bank of Niagara, Hopk. Ch., 354.



**§ 1189. Restraint of banking corporations purely statutory.**

The jurisdiction of equity in restraining the operations of banking institutions is purely statutory, and no warrant for its exercise is found in the general equity powers of the court.<sup>21</sup> And where the insolvency of a banking corporation is relied upon as the ground of enjoining its operations, mere affidavits on information and belief are not sufficient to warrant an injunction, especially when they are directly contradictory to the regular, official reports of the bank, made under oath and published according to law. Nor is the court at liberty to infer insolvency and to issue an injunction from the mere fact of the suspension of specie payments by such bank.<sup>22</sup>

**§ 1190. Dividends by foreign corporation; illegal stock.**

The directors of a foreign corporation will not be enjoined from payment of a dividend at the suit of one to whom no debt is due from the corporation, whose only ground for the injunction is a supposed error on the part of the directors in making the dividend. In such a case, complainant will be left to his redress in the state in which the company was incorporated.<sup>23</sup> But where the directors of a company incorporated in two different states have made issues of stock which are illegal and void, they may be restrained from using the proceeds of the sale of such stock until both the states in which

<sup>21</sup> *Attorney-General v. Bank of Michigan*, Harring. (Mich.), 315.

<sup>22</sup> *Livingston v. Bank of New York*, 26 Barb., 304. But it is held in Missouri, under the statutes of the state regulating the subject of insurance, that a court of equity may entertain an action instituted by the superintendent of the insurance department of the state to enjoin a life insurance company from doing business and to wind up its affairs, when it has re-insured its

risks and ceased to take new ones. *Price v. St. Louis Mutual Life Insurance Co.*, 3 Mo. App., 262. And as to the right to an injunction to restrain an insurance company from doing business under the laws of New Jersey, when its capital is impaired, see *Streit v. Citizens Fire Insurance Co.*, 29 N. J. Eq. (2 Stew.), 21.

<sup>23</sup> *Howell v. Chicago & N. W. R. Co.*, 51 Barb., 378.

the company was incorporated have ratified the issue alleged to be illegal and void. But the injunction in such a case will only be allowed to stand as to the illegal issue, and dealings in the genuine stock will not be enjoined, nor will the general business of the company be interfered with.<sup>24</sup> And an injunction restraining the use of the proceeds of sale of new stock issued by the directors of a foreign corporation will not be continued when both the states in which the company was incorporated have recognized the validity of the issue of the stock against which the writ was directed.<sup>25</sup> And although an officer of an incorporated company, who has made illegal and unauthorized issues of stock to himself, may be enjoined from transferring such stock to a third person, the relief will be allowed only upon a proper showing of the illegality of the issues and of the proposed transfer.<sup>26</sup>

§ 1191. **Joinder of parties.** Where the court may properly exercise its jurisdiction, a defect in the joinder of parties may sometimes prove an effectual bar to granting the relief. Thus, where a bill charges unlawful and improper conduct on the part of a corporation, but prays an injunction against the president, directors and agents, without asking that the writ issue against the corporation itself, such omission is fatal if insisted upon by defendant.<sup>27</sup> But where an injunction is sought against a corporation to prevent a fraudulent sale of corporate property to one who is not made a party to the action, such non-joinder is not demurrable.<sup>28</sup>

§ 1192. **Diversion of funds from corporate purposes.** Equity will enjoin any improper diversion of corporate funds for other than corporate purposes, and will restrain the managers of a company from engaging in any enterprise not contem-

<sup>24</sup> *Fisk v. Chicago*, R. I. & P. R. Co., 53 Barb., 513.

<sup>25</sup> *O'Brien v. Chicago*, R. I. & P. R. Co., 53 Barb., 568.

<sup>26</sup> *Sherman v. Clark*, 4 Nev., 138.

<sup>27</sup> *Binney's Case*, 2 Bland, 99.

<sup>28</sup> *Abbot v. American Hard Rubber Co.*, 4 Blatch., 489.

plated by the articles of incorporation.<sup>29</sup> The jurisdiction extends even further; and where an incorporated company ceases to prosecute the work for which it was created, and attempts to misapply its funds, or attempts any radical change in the character of the enterprise in which it is engaged, it may be enjoined from collecting the obligations given to support the original undertaking.<sup>30</sup> Where, however, the principal object of the bill is the appointment of a receiver for the management of the affairs of a railway corporation, the directors and officers of the company will not be enjoined from acting in their official capacity, where such restraint is not necessary for the accomplishment of the principal object of the bill.<sup>31</sup>

§ 1193. **Election to membership.** A court of equity will not interfere by injunction with election to membership in a private corporation, upon a bill by a member of the corporation alleging that the election complained of would injure plaintiff and deprive him of his legal rights and privileges as a member, and would deprive him of his rightful voice in the management of the property and affairs of the corporation. An injunction is not regarded as an appropriate remedy for such grievances, especially when a remedy is provided by statute by a summary application to a court of law.<sup>32</sup>

§ 1194. **Disciplining members; when violation of rules enjoined; membership in social club.** The power which is usually exercised by corporations of expelling, disciplining or disfranchising their members for misconduct is regarded as of a *quasi* judicial nature, with which equity will not ordinarily interfere while the corporate authorities are acting within the scope of their powers. Where, therefore, members of a medical

<sup>29</sup> Kean v. Johnson, 1 Stockt., 401; Smith v. Bangs, 15 Ill., 399; <sup>31</sup> Stevens v. Davison, 18 Grat., 819.

Sears v. Hotchkiss, 25 Conn., 171; <sup>32</sup> Thompson v. Society of Tam-Hill v. Glasgow R. Co., 41 Fed., 610. many, 17 Hun, 305.

<sup>30</sup> Illinois v. Cook, 29 Ill., 237.

association or corporation are being tried for alleged misconduct, contrary to their duty as corporators, a court of equity will not interfere by injunction with the act of the corporation, such interference being regarded as not within the jurisdiction of equity.<sup>33</sup> So where a member of an incorporated association is suspended from membership in accordance with the rules and by-laws of the association to which all its members subscribe, equity will not entertain jurisdiction to restrain the enforcement of such suspension.<sup>34</sup> So a court of equity will not enjoin a corporation such as a board of trade from trying one of its members upon charges of violating its rules and by-laws where the board, in proceeding to such trial, is acting under and in conformity with its rules and by-laws, which are reasonable and proper in themselves and to which plaintiff has assented in becoming a member.<sup>35</sup> And an injunction being a preventive remedy, it will not lie to undo what has already been done. It will not, therefore, be used for the purpose of restoring to membership in a private corporation, such as a board of trade, a member who has been expelled by the action of the corporation.<sup>36</sup> It is also held that where a trustee in an incorporated company is removed from his office for non-attendance, pursuant to a power conferred by the charter, long acquiescence in such removal affords sufficient ground for refusing relief by a preliminary injunction to restrain the board from preventing him from acting as such trustee.<sup>37</sup> Nor will equity enjoin a corporation from inquiring into the conduct of one of its officers and

<sup>33</sup> *Gregg v. Massachusetts Medical Society*, 111 Mass., 185.

<sup>34</sup> *Rorke v. Russell*, 2 Lans., 244; *Pitcher v. Board of Trade*, 121 Ill., 412, 13 N. E., 187.

<sup>35</sup> *Green v. Board of Trade*, 174 Ill., 585, 51 N. E., 599, 49 L. R. A., 365. But equity may enjoin a corporation and its directors from trying a stockholder for an alleged

violation of by-laws which are *ultra vires* and void. *Kolff v. St. Paul F. Exchange*, 48 Minn., 215, 50 N. W., 1036.

<sup>36</sup> *Fisher v. Board of Trade of Chicago*, 80 Ill., 85; *Baxter v. Same*, 83 Ill., 146; *Pitcher v. Board of Trade*, 121 Ill., 412, 13 N. E., 187.

<sup>37</sup> *Van Ranst v. New York College*, 4 Hun, 620.

members and investigating charges against him with a view to his removal, the corporation having full power to make such investigation and removal.<sup>38</sup> But an injunction will lie to protect the rights of a member of a board of trade against the adverse decision of a committee of the board appointed under the rules of the organization to determine the amounts and ownership of certain marginal deposits, where the committee is violating the rules of the board by refusing to hear evidence of the market value of the commodity for which the margins were deposited. But the relief is granted in such case for the purpose of preventing an improper or illegal disposition of property rights and the court does not seek to interfere with the disciplinary powers vested in the board.<sup>39</sup> And a member of a club may be protected by injunction in his rights of membership, when the proceedings for his expulsion have been had without proper notice or hearing, and not in accordance with the rules of the club.<sup>40</sup> It is to be observed, however, that the relief in such cases is founded upon plaintiff's proprietary right in the club and that where, under the organization of the club, no such right exists, the injunction will be denied.<sup>41</sup> And in no event will relief be granted to restrain the enforcement of an alleged illegal by-law of a corporation, where there is no showing of positive and substantial injury to plaintiff and where the enforcement of the by-law would be merely the imposition of a fine which there is no means of collecting except by an action at law therefor, in which the alleged invalidity of the by-law could be pleaded as a defense.<sup>42</sup>

§ 1195. **Rights of creditors.** When a corporation is being voluntarily wound up under a statute providing that all

<sup>38</sup> *O'Grady v. Governors*, 19 L. R. Ir., 350. *Keane*, 11 Ch. D., 353; S. C., 49 L. J. R. N. S. Ch., 11.

<sup>39</sup> *Ryan v. Cudahy*, 157 Ill., 108, 41 N. E., 760, 49 L. R. A. 353, 48 Am. St. Rep., 305. <sup>41</sup> *Baird v. Wells*, 44 Ch. D., 661. See *Harington v. Sendall*, (1903) 1 Ch., 921.

<sup>40</sup> *Labouchere v. Earl of Wharncliffe*, 13 Ch. D., 346; *Fisher v. Thomas v. M. M. P. U.*, 121 N. Y., 45, 24 N. E., 24.

creditors shall be paid *pari passu*, equity will not permit one creditor to obtain an advantage over the others by proceedings at law, and will restrain him from proceeding by execution for the recovery of his debt, his judgment having been recovered upon the same day with the confirmation of the proceedings for winding up the company.<sup>43</sup> But where the property of a defunct corporation has passed into the hands of its directors as trustees for the creditors, such trustees will not be permitted to enjoin a judgment creditor from satisfying his judgment out of the property, when they have delayed for a number of years to apply the property in payment of such debt, and when it is not shown that there are other creditors whose rights should be protected.<sup>44</sup> So in proceedings in equity for the voluntary dissolution of a corporation under the statutes of a state, the court will not interfere by injunction with the rights of judgment creditors, whose judgments were obtained in good faith and by the use of due diligence before the proceedings for dissolution were instituted.<sup>45</sup> And upon the presentation of an application for the voluntary dissolution of a corporation it is improper to enjoin the creditors from enforcing their demands *in limine*, and at the same time with the rule to show cause why the dissolution should not be had.<sup>46</sup>

§ 1196. **When creditors enjoined from suing insolvent corporations.** When a corporation has passed into the hands of a receiver appointed by a court of equity to wind up its affairs, the decree dissolving the corporation and directing the distribution of its assets is regarded as in the nature of a judgment for all the creditors, and they are subject to the summary jurisdiction of the court in matters pertaining to the administration of the estate of the insolvent corporation. They may, therefore, be enjoined from prosecuting suits against the

<sup>43</sup> *In re Sabloniere Hotel Co., L. R. 3 Eq., 74.*

<sup>45</sup> *In re Waterbury*, 8 Paige, 380.

<sup>46</sup> *In re French Manufacturing*

<sup>44</sup> *Good v. Sherman*, 37 Tex., 660. Co., 12 Hun, 488.

company by motion in the suit in which the receiver was appointed, and without the bringing of a new suit for that purpose.<sup>47</sup>

§ 1197. **Insolvent corporations.** Upon a bill filed by persons insured in an insurance and loan association against its directors and managers, showing gross mismanagement and waste of the trust funds out of which the insured were to be paid, and it appearing that there was danger of the remaining funds being wasted and plaintiffs being deprived of all remedy in the premises, the case was regarded as a proper one for an injunction and a receiver, the relief being based upon the ground of a breach of trust.<sup>48</sup> And upon the appointment of a receiver of all the property and effects of a corporation for the purpose of winding up its affairs, it is proper in connection with such appointment and as a part of the order to enjoin the directors and officers from collecting any debts or demands due to the corporation, and from transferring or incumbering any of its property or effects, the injunction, in such case, being regarded as an appropriate adjunct of the receivership.<sup>49</sup>

§ 1198. **When corporation enjoined from dissolution.** Where the purpose of the action is to fix the liability of the defendant corporation to plaintiff for profits received under certain contracts, and the corporation has attempted to procure its own dissolution, it may be enjoined from taking any proceedings for a dissolution, or for the appointment of a receiver, or for the distribution of its effects among its shareholders, and from making any transfer of its effects.<sup>50</sup>

§ 1199. **Misconduct of directors.** The directors of a company organized for the improvement of highways under the

<sup>47</sup> Attorney-General v. Guardian M. & G., 911, reversing S. C., 3 Mutual Life Insurance Co., 77 N. Drew., 75.

Y., 272. See also Woerishoffer v. <sup>49</sup> Morgan v. New York & Albany North River C. Co., 99 N. Y., 398, R. Co., 10 Paige, 290.  
2 N. E., 47. <sup>50</sup> Fisk v. Union Pacific R. Co.,

<sup>48</sup> Evans v. Coventry, 5 DeGex, 10 Blatch., 518.

laws of a state may be enjoined from paying out any money upon contracts made with their own members, since a director of a corporation can not be permitted to contract with himself; and the relief, in such case, will be granted at the suit of taxpayers whose taxes would be affected by such payment.<sup>51</sup> But a court of equity will not lend its aid by injunction in behalf of the directors of an insurance company, constituted by deed, to restrain alleged misconduct upon the part of another director, when plaintiffs have failed to avail themselves of the powers of regulation given them by such deed.<sup>52</sup> Nor can the attorney-general of a state, in behalf of and in the name of the people, maintain an action to restrain the prosecution of suits growing out of controversies and disputes among different claimants to the management and directorship of a railway corporation, or to restrain certain directors from acting as such, since equity will not interfere in behalf of the public with the litigation of private parties, however numerous the parties or bitter the controversy.<sup>53</sup>

§ 1200. **Gross abuse of powers enjoined.** Corporations may be restrained from any gross abuse of their powers resulting in injury to individuals, since equity will not permit corporate bodies, with whom it is always difficult to deal upon equal terms, to take, under color of authority, proceedings of doubtful legality, if by so doing they place those against whom their proceedings are directed in a position of peril, from which it would be difficult to extricate themselves.<sup>54</sup> And when the charter of a water company limits its charges to consumers, but the company seeks to exact higher rates, a consumer may

<sup>51</sup> *Port v. Russell*, 36 Ind., 60.

<sup>52</sup> *Ellison v. Bignold*, 2 Jac. & W., 503.

<sup>53</sup> *People v. Albany & S. R. Co.*, 5 Lans., 25, reversing S. C., 1 Lans., 308, 55 Barb., 344, 38 How. Pr., 228. As to the right of one of two incorporated companies owning

and using a cemetery in common to enjoin the other from preventing the use by plaintiff of such cemetery, see *Ladies Benevolent Society v. Benevolent Society*, 2 Tenn. Ch., 77.

<sup>54</sup> *Mayor v. Groshon*, 30 Md., 436.



enjoin the company from cutting off his supply for refusal to comply with its illegal demands.<sup>55</sup>

§ 1201. **President enjoined from levying execution.** The president of a corporation, who purchases a small indebtedness against it, may be enjoined from levying an execution for payment of a balance due upon such indebtedness, when he has already taken valuable property of the corporation in part payment, the relief being allowed in such case upon the ground that the president is a trustee for the corporation.<sup>56</sup>

§ 1202. **National bank not enjoined from loaning on negotiable paper.** A court of equity will not enjoin a bank which is organized and operating under the national banking act from making loans upon negotiable paper secured by stocks and bonds of marketable value as collateral, such loans being plainly within the powers of national banks.<sup>57</sup>

§ 1202 *a*. **Market quotations; board of trade; telegraph companies; ground of jurisdiction.** When a corporation, such as a board of trade or commercial exchange, has so conducted its business for many years as to create a standard market for agricultural products, and, in connection with telegraph companies admitted to the floor of the exchange, has established a system for the instantaneous transmission of market quotations and reports, and has voluntarily and intentionally devoted its property to a public use to such an extent that the business has become affected with a public interest, such companies will not be permitted to make any unjust discrimination as to the persons to whom such quotations shall be furnished. And a bill will lie to restrain defendants from withholding the quotations from plaintiff, or from discriminating between plaintiff and other persons in that regard.<sup>58</sup> But the relief in

<sup>55</sup> *Levy v. New Orleans W. Co.*, 38 La. An., 25; *Ernst v. New Orleans W. Co.*, 39 La. An., 550, 2 So., 415.

<sup>56</sup> *Brewster v. Stratman*, 4 Mo. App., 41.

<sup>57</sup> *Shoemaker v. National Mechanics Bank*, 1 Hughes, 101.

<sup>58</sup> *New York & C. G. & S. Ex.*

such cases is based upon the theory that the corporation has voluntarily and intentionally devoted its property and business to a use in which the public has an interest. And where the business which it is sought to subject to a public use was purely private in the beginning and the public interest is sought to be impressed upon it not as the result of a voluntary and intentional grant to the public but simply because, by a mere process of growth and expansion, the business has attained such a magnitude as to affect the public interest, the relief will be denied.<sup>59</sup> Nor will the injunction be granted at the instance of a plaintiff who is engaged in conducting a so-called bucket-shop in violation of law.<sup>60</sup> And a telegraph company which has constructed and is operating lines of telegraph along the right of way of a railroad company can not maintain a bill to enjoin other telegraph companies from so doing, although it may be protected by injunction in the possession of its own lines.<sup>61</sup>

§ 1202 *b*. **Discrimination by Associated Press enjoined.** The Associated Press, being a corporation engaged in a business to which a public interest attaches, can make no distinction or discrimination as between persons who desire to make use of the news and information collected by it; and since a provision in a contract between it and one of its customers to the effect that the latter shall not sell its specials to certain persons who are considered hostile by the directors of the association, or receive news from them, is illegal and void as being

change *v.* Board of Trade of Chicago, 127 Ill., 153, 19 N. E., 855, 2 L. R. A., 411, 11 Am. St. Rep., 107. See, *contra*, Metropolitan G. & S. Exchange *v.* Mutual U. T. Co., 11 Biss., 531; S. C. *sub. nom.* Metropolitan G. & S. Exchange *v.* Chicago Board of Trade, 15 Fed., 847.

<sup>59</sup> American Live Stock C. Co. *v.* Chicago Live Stock Exchange,

143 Ill., 210, 32 N. E., 274, 18 L. R. A., 190, 36 Am. St. Rep., 385.

<sup>60</sup> Central Stock & Grain Exchange *v.* Board of Trade, 196 Ill., 396, 63 N. E., 740.

<sup>61</sup> Western Union T. Co. *v.* National T. Co., 22 Blatch., 108; Western Union T. Co. *v.* American Union T. Co., 9 Biss., 72; Pensacola T. Co. *v.* Western Union T. Co., 96 U. S., 1.

in restraint of trade and competition, the attempted suspension or expulsion of a member of the association for a violation of such provision will be restrained by injunction.<sup>62</sup>

§ 1202 *c.* **Injunction against sale of stock representing controlling interest in corporation.** Where plaintiff has deposited with a third person shares of stock which are to be delivered to defendant upon the performance of certain specified conditions and which represent the controlling interest in a corporation, and defendant fraudulently and without performing the conditions secures possession of the stock and is threatening to sell and transfer the certificates, an injunction is the appropriate remedy to restrain such a disposition of the shares owing to the inadequacy of the legal remedy to afford redress. The fact that the stock represents a controlling interest in the corporation and that the determination of its real value to the plaintiff would be difficult of ascertainment in an action at law for conversion, and the further fact that a possible purchaser from defendant might obtain rights superior to the plaintiff's equities, afford proper ground for the interposition of equity by injunction.<sup>63</sup>

<sup>62</sup> *Inter-Ocean Co. v. Associated Press*, 184 Ill., 438, 56 N. E., 822, 48 L. R. A., 568, 75 Am. St. Rep., 184.      <sup>63</sup> *Hower v. Weiss M. & E. Co.*, 5 C. C. A., 129, 55 Fed., 356.

## II. INJUNCTIONS IN BEHALF OF SHAREHOLDERS.

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§ 1203. **The general doctrine stated.** The protection of the rights of shareholders in incorporated companies against the improper or illegal action of other shareholders, or of the officers of the company, is a favorite branch of the jurisdiction of equity by injunction. And it may be asserted as a general rule, that courts of equity may enjoin, in behalf of the stockholders of an incorporated company, any improper alienation or disposition of the corporate property for other than corporate purposes, and will restrain the commission of acts which

are contrary to law and tend to the destruction of the franchise, as well as the improper management of the business of the company, or a wrongful diversion of its funds or from depriving plaintiff of his rights as a corporator.<sup>1</sup> And in such case equity may grant relief at the suit of a single stockholder.<sup>2</sup> So if the managers of the company are about to engage in any enterprise not contemplated by their charter, or are proceeding to apply corporate funds to any other than corporate purposes, or, in general, if they are transcending their charter, equity will interfere.<sup>3</sup> And where a railway company, without authority of law, is proceeding to become a stockholder in another company, it may be enjoined by its stockholders from thus transcending its charter, the relief being granted as well for the protection of the stockholders, as because the proceedings are contrary to public policy.<sup>4</sup> So the members of a mutual insurance company may enjoin the company from making an assessment upon its members for the purpose of paying an invalid policy, the relief being granted owing

<sup>1</sup> *Kean v. Johnson*, 1 Stockt., 401, a leading American case; *Manderson v. Commercial Bank*, 28 Pa. St., 379; *Sears v. Hotchkiss*, 25 Conn., 171; *Bagshaw v. Eastern R. Co.*, 7 Hare, 114; *Colman v. Eastern Counties R. Co.*, 10 Beav., 1; *Attorney-General v. Great N. R. Co.* 1 Dr. & Sm., 154; *Central R. Co. v. Collins*, 40 Ga., 582; *Harding v. American Glucose Co.*, 182 Ill., 551, 55 N. E., 577, 74 Am. St. Rep., 189; *Bixler v. Summerfield*, 195 Ill., 147, 62 N. E., 849; *Frostburg Building Association v. Stark*, 47 Md., 338; *Fraser v. Whalley* 2 Hem. & M., 10; *Tipton Fire Co. v. Barnheisel*, 92 Ind., 88; *Fisher v. Patton*, 134 Mo., 32, 34 S. W., 1096; *Small v. Minneapolis E.-M. Co.*, 45 Minn., 264, 47 N. W., 797; *For-*

*rester v. B. & M. Co.*, 21 Mont., 544, 55 Pac., 229, 353.

<sup>2</sup> *Kean v. Johnson*, 1 Stockt., 401; *Mozley v. Alston*, 1 Ph., 798; *Simpson v. Westminster P. H. Co.*, 8 H. L., 717. And see *Gifford v. New Jersey R. & T. Co.*, 2 Stockt., 171, and *Stewart v. Erie & W. T. Co.*, 17 Minn., 372, where the same principle is upheld, although the injunction seems to have been refused on other grounds.

<sup>3</sup> *Smith v. Bangs*, 15 Ill., 399; *Beman v. Rufford*, 6 Eng. Law & Eq. R., 106; *Simpson v. Denison*, 10 Hare, 51; *Cherokee Iron Co. v. Jones*, 52 Ga., 276; *Cohen v. Wilkinson*, 1 Mac. & G., 481.

<sup>4</sup> *Central R. Co. v. Collins*, 40 Ga., 582; *Salomons v. Laing*, 12 Beav., 339.

to the inadequacy of the remedy at law.<sup>5</sup> So one who owns and holds as security a large quantity of the stock of an incorporated company may enjoin the transfer of the corporate property to another corporation organized in a foreign state, upon a bill alleging that such transfer was intended to render his stock worthless and to deprive him of all control in the company.<sup>6</sup> So the minority stockholders in a corporation may enjoin the majority, who are the officers of the company, from paying themselves excessive salaries and from investing the corporate funds in real estate which is not necessary for the corporate purposes.

§ 1204. **Illustrations of the relief.** In accordance with the principles laid down in the preceding section, it has been held that shareholders in a bank are entitled to an injunction against the officers of the bank to prevent the continued commission of acts which are contrary to law and which endanger the existence of the charter; and this even where, from the affidavits exhibited on both sides, the truth of the charge is left somewhat in doubt, since the awarding of an injunction under such circumstances can work no injury, and only affords the stockholders a proper measure of protection.<sup>8</sup> And gross mismanagement of the affairs of a corporation by its directors, coupled with the embezzlement by its officers of large sums of money, and a refusal on the part of the directors to institute proceedings for their recovery, afford sufficient ground for enjoining the directors from further management of the affairs of the corporation, upon a bill filed by shareholders.<sup>9</sup> So a minority of the stockholders of a corporation, some of whom are also directors, may enjoin the remaining stockholders, who control a large portion of the stock and constitute

<sup>5</sup> *Carmien v. Cornell*, 148 Ind., 83,  
47 N. E., 216.

<sup>6</sup> *Kelly v. Mariposa L. & M. Co.*,  
4 Hun, 632.

<sup>7</sup> *Bixler v. Summerfield*, 195 Ill.,  
147, 62 N. E., 849.

<sup>8</sup> *Manderson v. Commercial  
Bank*, 28 Pa. St., 379.

<sup>9</sup> *Frostburg Building Association  
v. Stark*, 47 Md., 338.

a majority of the board of directors, from fraudulently mis-managing the business, or diverting the funds.<sup>10</sup>

§ 1205. **Departure from purpose of incorporation.** As still further illustrating the doctrine of relief by injunction against a departure from the purpose of the incorporation, it is held that where a company is incorporated for manufacturing iron, a shareholder is entitled to a preliminary injunction until the final hearing to prevent the use of the corporate funds for a purpose foreign to that contemplated by the charter, as for the erection of a flouring mill; since a shareholder has the right to insist that the corporate funds shall be devoted to the uses designated by the charter.<sup>11</sup> And since a shareholder in a corporation is entitled to have the contract to which he has subscribed strictly performed, he is, for this reason, entitled to restrain a departure from the object of the incorporation. Thus, a stockholder in a railway company may enjoin a diversion of the corporate funds by building only a small portion of the road as originally contemplated.<sup>12</sup> But the acquiescence of a shareholder, in such a case, in the building of a smaller portion of the road than that originally contemplated and authorized, will estop him from relief by injunction against such construction. And it is proper, also, for the court to consider, as ground for refusing the relief, the fact that the work has proceeded almost to completion, at a large outlay of money, and that its stoppage by an injunction would be extremely disastrous.<sup>13</sup> Nor can a shareholder owning a minority of the capital stock restrain the holders of a majority of the shares from accepting an amendment to the

<sup>10</sup> *Sears v. Hotchkiss*, 25 Conn., 171. And it is held that the fact that a remedy at law exists by an action in behalf of the corporation, or of the aggrieved stockholders, against the wrong-doers, constitutes no bar to an injunction in such a case. *Id.*

<sup>11</sup> *Cherokee Iron Co. v. Jones*, 52 Ga., 276.

<sup>12</sup> *Cohen v. Wilkinson*, 1 Mac. & G., 481.

<sup>13</sup> *Graham v. Birkenhead L. & C. J. R. Co.*, 2 Mac. & G., 146.

charter, such as a change in the number of directors, which does not work a fraudulent change in the objects of the corporation.<sup>14</sup>

§ 1206. **Diligence required; illustrations.** A shareholder must, however, use due diligence in the assertion of his rights, to entitle him to relief in equity against a wrongful diversion of corporate funds, or other misconduct on the part of the company, and negligence on his part in instituting proceedings will deprive him of the relief desired.<sup>15</sup> And where a corporation departs from the original object of its charter, without the consent of all its stockholders, he who would avail himself of the remedy by injunction must show that he has been prompt and vigilant in claiming the aid of equity, since if he waits until the mischief complained of is accomplished, or until large sums of money have been expended and great public interests created, he will be held to have acquiesced in the change.<sup>16</sup> Thus, an injunction will be refused in behalf of shareholders of a railway company, seeking to restrain its construction upon the ground that the time has expired within which it should be completed, when there has been long acquiescence on the part of plaintiffs. And in such case a shareholder is bound by the acquiescence of one from whom he has purchased his share, although he himself is chargeable with no delay.<sup>17</sup>

§ 1207. **Single shareholder allowed relief; joinder of shareholders as plaintiffs.** In cases where relief in equity is sought

<sup>14</sup> *Mower v. Staples*, 32 Minn., 284, 20 N. W., 225.

<sup>15</sup> *Gregory v. Patchett*, 33 Beav., 595; *Kent v. Jackson*, 14 Beav., 367; *Gray v. Chaplin*, 2 Russ., 126; *Chapman v. Mad River R. Co.*, 6 Ohio St., 119; *Ffooks v. South Western R. Co.*, 1 Sm. & Gif., 142; *Coquard v. National Linseed Oil Co.*, 171 Ill., 480, 49 N. E., 563.

<sup>16</sup> *Chapman v. Mad River R. Co.*, 6 Ohio St., 119; *Goodin v. Cincinnati R. Co.*, 18 Ohio St., 169; *Leo v. Union Pacific R. Co.*, 22 Blatch., 22. And see *Chapman v. Railroad Companies*, 6 Ohio St., 136; *Watt's Appeal*, 78 Pa. St., 370.

<sup>17</sup> *Ffooks v. South Western R. So.*, 1 Sm. & Gif., 142.



by an aggrieved shareholder against any mismanagement of the corporate business, or misappropriation of corporate funds, the amount of the interest of such shareholder will not be considered in granting the relief.<sup>18</sup> And a single shareholder, suing in behalf of himself and all others having a common interest with him, is entitled to the aid of equity to prevent a diversion of corporate funds to other than corporate purposes, though all the other members of the company are opposed to him,<sup>19</sup> since, while the members and shareholders of an incorporated company may possibly change the contract which they have entered into with each other and form a new one by common consent of all parties, they have no right so to do without the consent of every shareholder in the company.<sup>20</sup> But, although the jurisdiction by injunction for the protection of a single shareholder from illegal acts of the corporation is well established, it will not be exercised upon a suit by a shareholder to restrain the enforcement by the corporation of a contract with another corporation, when the defendant company itself repudiates the contract and refuses to act upon it, since equity does not interfere by injunction to prevent imagined wrongs which there is no real ground for apprehending.<sup>21</sup> Nor will the relief be granted in behalf of a single shareholder when it appears that he is only a colorable plaintiff, acting in the interest of other parties who are interested in a rival corporation.<sup>22</sup> Upon the other hand, the several members of a corporation may properly join together to restrain an illegal

<sup>18</sup> *McDonnell v. Grand Canal Co.*, 55 N. E., 577, 74 Am. St. Rep., 189. 3 Ir. Ch., 578.

<sup>19</sup> *Kean v. Johnson*, 1 Stockt., 401; *Mozley v. Alston*, 1 Ph., 798; *Simpson v. Westminster P. H. Co.*, 8 H. L., 717; *Beman v. Rufford*, 1 Sim. N. S., 564; *Bruschke v. Der Nord Chicago S. Varein*, 145 Ill., 433, 34 N. E., 417; *Harding v. American Glucose Co.*, 182 Ill., 551,

<sup>20</sup> *Ernest v. Nicholls*, 6 H. L., 401; *Ex parte Morgan*, 1 Mac. & G., 236.

<sup>21</sup> *Stewart v. Erie & W. T. Co.*, 17 Minn., 372.

<sup>22</sup> *Filder v. London R. Co.*, 1 Hem. & M., 489. And see *Sparhawk v. Union P. R. Co.*, 54 Pa. St., 401.

diversion of the corporate funds where their interests are identical. Thus, the members of a mutual life insurance company, although deriving their rights under separate and independent policies, have such a community of interest as will enable them to unite in a bill to enjoin the company from making payment of an invalid policy.<sup>23</sup>

§ 1208. **Applications to legislature, when enjoined.** Some apparent conflict is to be found in the adjudicated cases upon the right of stockholders to restrain corporate authorities from taking steps to change the powers or extend the business of the company, by invoking legislative action for that purpose. This conflict is, however, more apparent than real, and no difficulty will be found in reconciling the decisions by observing the distinction between cases of a simple application to the legislative authority for a change in the constitution or powers of an incorporated company, and cases where it is sought to divert corporate funds from their legitimate use for defraying the expenses of such an application. The right of a company, acting in its corporate capacity, to invoke legislative aid for changing the objects and powers of the corporation is unquestioned, and equity will not, at the suit of a shareholder of a company incorporated by act of parliament, enjoin an application to parliament for a change in the constitution of the company by extending its powers or by substituting a new body for the old.<sup>24</sup> Nor will an injunction be granted to restrain the trustees of a corporation organized in a foreign country from applying to the legislature of that country for power to increase its capital stock.<sup>25</sup> And an injunction will not be allowed to restrain a corporation from applying to the legislature for a change

<sup>23</sup> *Carmien v. Cornell*, 148 Ind., 83, 47 N. E., 216.

<sup>24</sup> *Ware v. Grand Junction Water Works Co.*, 2 Russ. & M., 470; *Stevens v. South Devon R. Co.*, 13

Beav., 48. See *Great Western R. Co. v. Rushout*, 5 DeG. & Sm., 290.

<sup>25</sup> *Bill v. Sierra Nevada Co.*, 1 DeG., F. & J., 177.

of its powers upon the ground that, in the opinion of the complaining shareholders, the proposed legislation in inexpedient.<sup>26</sup> But where it is attempted to use the corporate funds for defraying the expenses of such an application, and for procuring an extension of the business of the company beyond the legitimate objects for which it was constituted, an injunction may be allowed, at the suit of shareholders, to prevent such improper diversion of the funds.<sup>27</sup>

§ 1209. **The same.** Notwithstanding the general rule laid down in the preceding section, that equity will not enjoin an application to the legislature for an extension of the powers of an incorporated company, relief may properly be granted against an application whose object is the destruction of the existing corporation. And where a majority of the members of a company are taking steps to surrender their charter, with a view to obtaining a new one for a purpose entirely different from that originally contemplated in the creation of the corporation, the minority of the shareholders may rightfully enjoin the proceedings until a hearing.<sup>28</sup>

§ 1210. **Acts in furtherance of objects not enjoined; officers not enjoined from exercising functions.** Although a shareholder may properly enjoin a corporation from employing its property in a way wholly or materially different from that which was designed by the act of incorporation, yet he will not be allowed to enjoin the doing of acts in direct furtherance of the object of its creation, and which are for the benefit of all the stockholders as such, even though such acts may be inju-

<sup>26</sup> *In re* London, Chatham & Dover Railway Arrangement Act, L. R. 5 Ch., 671.

<sup>27</sup> *Simpson v. Denison*, 10 Hare, 62; *Munt v. Shrewsbury R. Co.*, 13 Beav., 1; *Stevens v. South Devon R. Co.*, *Ib.*, 48; *Spackman v. Lattimore*, 3 Gif., 16; *Great Western R. Co. v. Rushout*, 5 DeG. & Sm.,

290; *Vance v. East Lancashire R. Co.*, 3 Kay & J., 50. See also *Attorney-General v. Commissioners of Kingstown*, I. R. 7 Eq., 383; *Telford v. Metropolitan Board of Works*, L. R. 13 Eq., 574.

<sup>28</sup> *Ward v. Society of Attornies*, 1 Coll., 370.

rious to the party complaining in another capacity than that of stockholder, and although the interest of other persons or of the public may be injuriously affected thereby.<sup>29</sup> Nor will a court of equity, at the suit of stockholders of a corporation, restrain its officers from the exercise of their functions, since such restraint would be equivalent to removal from office, and over such a subject equity has no jurisdiction.<sup>30</sup> So a shareholder can not enjoin directors from selling a portion of the shares to the president at par and for a full and valuable consideration, when the directors are acting within the scope of their authority and the transaction is free from fraud.<sup>31</sup> And equity will not, at the suit of a shareholder, interfere with the action of the directors unless they have exceeded their corporate powers, or unless their acts are fraudulent or collusive, and injurious to the rights of plaintiff. Thus, where a corporation engaged in the steamship business has contracted to pay certain subsidies to induce a rival line to withdraw from competition, the enforcement of such contract will not be restrained at the suit of a shareholder, the contract being within the corporate powers of the company and no fraud being shown.<sup>32</sup>

§ 1211. **Consolidation and merger.** A consolidation or merger of one incorporated company with another, without authority and without consent of the stockholders as required by the articles of association, may, as to the property not yet transferred, be enjoined until the final hearing of the cause.<sup>33</sup> But the new company will not be enjoined from the use of property already transferred, nor will it be restrained from receiving from the stockholders of the old company a surrender of their stock, for the purpose of merging it in the new association.<sup>34</sup>

<sup>29</sup> *Baltimore & Ohio R. Co. v. Wheeling*, 13 Grat., 40.

<sup>30</sup> *Bayless v. Orne*, Freem. Ch., 161.

<sup>31</sup> *Sims v. Street Railroad Co.*, 37 Ohio St., 556.

<sup>32</sup> *Leslie v. Lorillard*, 110 N. Y., 519, 18 N. E., 363, 1 L. R. A., 456.

<sup>33</sup> *Blatchford v. Ross*, 54 Barb., 42.

<sup>34</sup> *Blatchford v. Ross*, 54 Barb., 42.

§ 1212. **Estoppel against shareholder.** Where the conduct of the person complaining has been such as to amount to a waiver of his right to object to a proposed conversion of the corporate funds to other than the uses for which they were originally intended, he will not be allowed relief in equity against such use of the funds. Thus, where a depositor in a savings bank has consented that his deposits may be converted into stock, as a security for the payment of the debts of the corporation, and his conduct has been such as to amount to a voluntary dedication of his stock for the purpose of securing the debts, he is regarded as estopped from claiming relief in equity, and an injunction will be refused.<sup>35</sup>

§ 1213. **Disposition of property, when not enjoined.** A shareholder of a corporation, claiming that he has been defrauded in the issue of stock, can not enjoin the corporation from disposing of so much of its property as would indemnify him for his loss, since the money which he has contributed having been mixed with the general funds, he stands in no better position than that of a general creditor of the corporation.<sup>36</sup>

§ 1214. **Judgment confessed; bill in aid of other persons.** Notwithstanding courts of equity may properly interfere at the suit of stockholders for the protection of an incorporated company, yet where a debt authorized by the company has been created by and with the consent of the shareholders and directors, and judgment is confessed therefor, a consenting shareholder is estopped from enjoining an execution under such judgment.<sup>37</sup> Nor will an injunction be allowed against the proceedings of a corporation at the suit of a stockholder, when it appears that his bill is not filed *bona fide* for his own protection, but is only a private bill in aid of other persons.<sup>38</sup>

<sup>35</sup> Maryland Savings Institution v. Schroeder, 8 Gill & J., 93.

<sup>36</sup> Whelpley v. Erie R. Co., 6 Blatch., 271.

<sup>37</sup> Gravenstine's Appeal, 49 Pa. St., 310.

<sup>38</sup> Sparhawk v. Union P. R. Co., 54 Pa. St., 401. And see Filder v. London R. Co., 1 Hem. & M., 489.

§ 1215. **Lease by corporation.** A shareholder in a corporation will not be allowed to enjoin the management of its business and works under a lease made by its directors, no fraud being alleged or shown.<sup>39</sup> Nor will a court of equity, at the suit of a small number of shareholders, enjoin the execution by a corporation or its directors of a lease of its property, canal, railroads and franchises to another corporation for a stipulated annual rental, when such lease is made under a valid act of legislature authorizing the lease upon the consent of a given number of shareholders, and providing that any shareholder who is dissatisfied shall be paid the full value of his stock, to be appraised by commissioners appointed for that purpose.<sup>40</sup> But the dissenting minority shareholders of a railroad corporation may enjoin a lease of the property, rolling stock and franchises of the corporation to another railroad corporation under a statute conferring the power to make the transfer in question, where the statute fails to make provision for the compensation of dissenting stockholders.<sup>41</sup>

§ 1216. **Minority protected against majority.** The protection which is extended by courts of equity to shareholders of corporations may be properly invoked in behalf of a minority against the wrongful acts of a majority of the shareholders.<sup>42</sup> And where the shareholders agree to discontinue the operations of a corporation, and to wind up and adjust its affairs, but a majority agree upon an arbitrary scheme or plan of settlement of the rights and liberties of the different members, to which the minority do not assent, the majority may be enjoined from carrying out such proposed scheme of settlement.<sup>43</sup> But equity will hesitate to interfere by injunction in behalf of a minority

<sup>39</sup> *Bowes v. Hoeg*, 15 Fla., 403.

<sup>40</sup> *Black v. Delaware & R. Co.*, 7 C. E. Green, 130.

<sup>41</sup> *Dow v. Northern R. R. Co.*, 67 N. H., 1, 36 Atl., 510.

<sup>42</sup> *City Loan & Building Association v. Goodrich*, 48 Ga., 445;

*Sears v. Hotchkiss*, 25 Conn., 171;

*Bixler v. Summerfield*, 195 Ill., 147, 62 N. E., 849; *Small v. Minneapolis E.-M. Co.*, 45 Minn., 264, 47 N. W., 797.

<sup>43</sup> *City Loan & Building Association v. Goodrich*, 48 Ga., 445.

of shareholders to restrain the majority of the shareholders and the directors from borrowing money to improve the corporate property, when the proof is conflicting and the difference between the parties is largely a difference as to the policy and internal management of the corporation.<sup>44</sup>

§ 1217. **Payment of dividends.** Relief by injunction is sometimes invoked for the purpose of restraining the payment of illegal dividends. And upon a bill by some of the shareholders of a corporation to enjoin the payment of dividends contrary to the act of incorporation, it is proper to enjoin the payment of future dividends, but not of dividends already declared when the shareholders are not all before the court. The reason for such distinction is found in the fact that, as to dividends already declared, each shareholder has a right of action for their recovery, and it is therefore improper to interfere when they are not all before the court.<sup>45</sup> But a corporation will not be enjoined from the payment of dividends to its shareholders because of its indebtedness to plaintiff, which is sought to be enforced by the action, when plaintiff's only demand is of a pecuniary nature resting in a contract whose specific performance is sought, and when the contract is of such a nature as to render it improbable that it can be specifically enforced.<sup>46</sup> Nor will equity interfere by injunction with the payment of dividends where the bill does not contain clear allegations that the corporation is insolvent or that the payment of the dividends would impair the capital.<sup>47</sup>

§ 1218. **Sale of property under execution; judgment in favor of receiver for unpaid subscription.** Equity will not enjoin a sale of the property of a corporation under an execution upon a judgment which is alleged to be void, upon a bill by a share-

<sup>44</sup> *Lamar v. Lanier H. Co.*, 76 Ga., 640.

<sup>45</sup> *Carlisle v. South Eastern R. Co.*, 1 Mac. & G., 689; *Fawcett v. Laurie*, 1 Dr. & Sm., 192.

<sup>46</sup> *South Yorkshire R. Co. v. Great Northern R. Co.*, 1 Sm. & Gif., 324.

<sup>47</sup> *Coquard v. National Linseed Oil Co.*, 171 Ill., 480, 49 N. E., 563.

holder and creditor of the company, when sufficient remedy exists at law, and when it is not shown that the officers of the company have been requested to take the necessary steps at law, or that such request has been omitted for some sufficient reason.<sup>48</sup> So a shareholder can not enjoin a sale of the corporate property under foreclosure, judgment having been regularly obtained against the corporation, even though plaintiff had no notice of the proceedings.<sup>49</sup> And where, by the terms of its charter, a judgment against an incorporated company is made binding upon its shareholders, one who has had notice of the pendency of actions against the corporation, and who has declined to make any defense thereto, will be regarded as having had his day in court, and will not be permitted to enjoin such a judgment.<sup>50</sup> So under a statute authorizing the appointment of receivers to wind up the affairs of insolvent corporations, and requiring such receivers to collect from the shareholders the sums remaining due on account of their unpaid subscriptions to the capital stock, when such a receiver has obtained a decree for the balance due from a shareholder, the latter can not enjoin the receiver from collecting the amount until all the debts of the corporation can be ascertained and the amount due from each stockholder be determined, since such grounds should have been urged, if at all, in defense of the suit brought by the receiver.<sup>51</sup>

§ 1219. **Former shareholder; sale of stock for unpaid assessments.** An injunction, however, may properly be allowed upon a bill by a former shareholder in a banking corporation, who has sold his stock to the bank, to restrain it from continuing his name as shareholder, thereby rendering him liable to actions by creditors of the bank.<sup>52</sup> So a shareholder is entitled

<sup>48</sup> *City of Atlanta v. Grant*, 57 Ga., 340. See also *Ware v. Bazemore*, 58 Ga., 316.

<sup>49</sup> *Henry v. Elder*, 63 Ga., 347.

<sup>50</sup> *Lowry v. Sloan*, 51 Ga., 633.

<sup>51</sup> *Pentz v. Hawley*, 1 Barb. Ch., 122.

<sup>52</sup> *Taylor v. Hughes*, 7 Ir. Eq.,



to the aid of an injunction to prevent the consummation of a sale of his stock for unpaid assessments, when he has tendered the amount of his assessment before such sale.<sup>53</sup> So upon the ground of preventing irreparable injury and a multiplicity of suits, a shareholder may enjoin a sale of his stock for the payment of a call or assessment made by directors who have been illegally elected or appointed.<sup>54</sup> But a shareholder can not enjoin a sale of his stock to satisfy an unpaid assessment which is justly due, upon the ground that the notice of sale was published an insufficient time, when he has not paid or tendered payment of the assessment.<sup>55</sup>

§ 1220. **Transfer of shares of mining stock when lost.** It is held in Nevada, that in an action to recover possession of shares of mining stock purchased by the plaintiff, a mining corporation, and to quiet its title thereto, the shares having been lost or stolen from plaintiff's possession, it is proper to enjoin defendants from transferring such shares to any person other than plaintiff, they having no market value which could be estimated so as to afford an effectual remedy at law in damages.<sup>56</sup>

§ 1221. **Officers of canal enjoined by United States.** Where the United States was interested in and was the only shareholder in a canal, and had voted an appropriation for its improvement and repairs, for the better use and benefit of the public, the president and directors of the canal company were enjoined from interfering with the engineer officers and con-

529, affirming S. C. upon the preliminary hearing, 6 Ir. Eq., 480.

<sup>53</sup> *Mitchell v. Vermont C. M. Co.*, 67 N. Y., 280.

<sup>54</sup> *Moses v. Tompkins*, 84 Ala., 613, 4 So., 763.

<sup>55</sup> *Burham v. San Francisco F. M. Co.*, 76 Cal., 26, 17 Pac., 939.

<sup>56</sup> *Sierra Nevada Mining Co. v.*

*Sears*, 10 Nev., 346. It is to be noted however, that under the practice in Nevada in an action for the recovery of personal property it is competent for the court to enjoin the person wrongfully in possession from disposing of the property, when the remedy at law would otherwise prove ineffectual.

tractors of the government in prosecuting the work of repairing and improving the canal.<sup>57</sup>

§ 1222. **Auditing improper account.** It is held that a court of equity will not, in behalf of shareholders of an incorporated company, enjoin the board of directors of the corporation from auditing or allowing an improper account against the company, since the act of allowing such account as correct is not such an act of irreparable injury as to merit relief by injunction.<sup>58</sup>

§ 1223. **Special privileges to corporators.** It is also held that one who becomes a shareholder in a corporation, under a charter and regulations which extend especial rights and privileges to certain members, is bound by the rules and conditions existing at the time he becomes a member; and he can not, therefore, enjoin the corporation from preventing his participation in such exclusive privileges.<sup>59</sup>

§ 1223 *a*. **Injunction to restrain one corporation from voting stock of another; diligence required.** A shareholder in a corporation, the majority of the stock of which is owned by another corporation, may, under some circumstances, enjoin the latter from voting such stock, where it appears that the interests of the two corporations are antagonistic and the action of the defendant corporation will work great injury to the other corporation and to its shareholders. Thus, the minority shareholders of a railroad corporation may enjoin another railroad which owns a majority of the stock of the first from voting such stock at an approaching election of directors for the purpose of re-electing such board, where it appears that the directors are the same in both corporations and that they have been grossly mismanaging the affairs of the plaintiff's corporation and that the defendant had acquired such

<sup>57</sup> *United States v. Louisville & P. Canal Co.*, 4 Dill., 601.

<sup>58</sup> *Rogers v. Lafayette Agricultural Works*, 52 Ind., 296.

<sup>59</sup> *Johnson v. La Variete Association*, 28 La. An., 421.

stock for the purpose of controlling the election.<sup>60</sup> So a stockholder of a railroad company may enjoin another railroad from voting the stock of the first, where it appears that the two roads are competing corporations and that the defendant had acquired the stock in question for the purpose of defeating competition between them and creating a monopoly in the railroad business.<sup>61</sup> But where it does not appear that the interests of the two corporations are antagonistic, the relief will be denied, since in such case there is no likelihood of injury to the rights of the plaintiff shareholders. Thus, where it was sought to restrain a foreign corporation from voting the majority of the stock of a domestic corporation in which plaintiff was a shareholder, and it appeared that the two were engaged in somewhat dissimilar lines of business and there was no showing that their interests were hostile, the relief was denied.<sup>62</sup> And in no event will the injunction be granted in such cases unless the shareholder shows a previous demand upon the board of directors requesting them to take appropriate action in the name of the corporation to obtain the desired relief.<sup>63</sup> But a demand upon the directors is unnecessary in order to entitle the plaintiff to the protection of equity where it is clear that it would be unavailing. Thus, where the directors of plaintiff's corporation are also directors of the corporation which it is sought to enjoin, the writ will be allowed without any previous demand since in such case it is clear that the demand would not be heeded.<sup>64</sup>

§ 1223 *b*. **Mandatory injunction to compel transfer of stock.**

While the legal remedy by *mandamus* is ordinarily to be regarded as the appropriate proceeding to compel a corporation

<sup>60</sup> *Memphis & C. R. R. Co. v. Woods*, 88 Ala., 630, 7 So., 108, 7 L. R. A., 605, 16 Am. St. Rep., 81.

<sup>61</sup> *George v. Central R. & B. Co.*, 101 Ala., 607, 14 So., 752.

<sup>62</sup> *American R. & C. Co. v. Linn*, 93 Ala., 610, 7 So., 191.

<sup>63</sup> *Mack v. De Bardeleben C. & I. Co.*, 90 Ala., 396, 8 So., 150, 9 L. R. A., 650.

<sup>64</sup> *George v. Central R. & B. Co.*, 101 Ala., 607, 14 So., 752.

to transfer stock to the person entitled thereto, yet it is confined to cases where the controversy is wholly between a shareholder and the corporation; and where the question as to the ultimate right to the shares depends for its solution upon equities which exist between plaintiff and persons other than the corporation, which could not be adjudicated in a *mandamus* proceeding because such an action could be maintained only against the corporation, the legal remedy is regarded as inadequate and equity may therefore entertain jurisdiction of a suit brought against the corporation and such adverse claimant to adjudicate the ownership of the stock, and the court may in such case award a mandatory injunction against the corporation to compel a transfer.<sup>65</sup>

§ 1223 c. **Changing location of principal office of corporation.** Where the articles of association and fundamental law of a corporation, such as a fraternal beneficiary society, have fixed the principal office of the corporation at a particular place, the location can not be changed without an amendment to the articles of association and by-laws, and a member of the organization may enjoin the removal of the office and the expenditure of the funds of the corporation for that purpose, contrary to the provisions in question.<sup>66</sup> But a member of a benefit society can not enjoin the removal of its principal office out of the state where such action is authorized and is being carried out in the manner prescribed by the rules and by-laws of the association.<sup>67</sup>

§ 1223 d. **Mandatory injunction to enforce right to inspect corporate records.** In Ohio it is held that a shareholder in a corporation may have a mandatory injunction to compel the officers of the corporation to allow him to inspect the corporate

<sup>65</sup> *Scherck v. Montgomery*, 81 Miss., 426, 33 So., 507.

<sup>66</sup> *Bastian v. The Modern Woodmen of America*, 166 Ill., 595, 46 N. E., 1090.

<sup>67</sup> *Park v. The Modern Woodmen of America*, 181 Ill., 214, 54 N. E., 932.

books and records.<sup>68</sup> The court, however, fail to give any satisfactory reason for the doctrine thus announced and it is difficult to perceive why the legal remedy by *mandamus* should not afford ample protection for the rights of a shareholder in such a case. And in New Jersey it is held that the legal remedy by *mandamus* will ordinarily afford ample relief.<sup>69</sup>

<sup>68</sup> *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St., 189, 56 N. E., 1033, 48 L. R. A., 732, 78 Am. St. Rep., 707.      <sup>69</sup> *Stettauer v. New York & S. C. Co.*, 42 N. J. Eq., 46, 6 Atl., 303.

## III. ULTRA VIRES.

- § 1224. Corporate bodies enjoined from proceeding in excess of authority.
1225. Misappropriation of funds.
1226. Issue of preferred stock; arbitration concerning contracts *ultra vires*.
1227. Lease or sale of entire property enjoined; sale in violation of anti-trust laws; corporation may enjoin; good faith of plaintiffs.
1228. Plaintiffs must be actual shareholders; pledgees denied relief.
1229. Acquiescence of shareholders as an estoppel; corporation enjoined from resuming possession of property unlawfully leased.
- 1229a. Right of state to enjoin *ultra vires* acts.

§ 1224. **Corporate bodies enjoined from proceeding in excess of authority.** The doctrine of *ultra vires*, although of modern origin, is frequently invoked for the purpose of restraining the action of corporate bodies when proceeding in excess of their authority. And it may be stated as a general rule that where corporations are created by law for special purposes, they may properly be restrained in equity from exceeding the legitimate scope of their authority, or going beyond the purposes for which they were created.<sup>1</sup> Thus, a railway company has been enjoined from conducting the business of coal merchants, the company having been created for the specific purpose of constructing a railway. And the action may be properly brought in such case by

<sup>1</sup> Attorney-General *v.* Great N. Maunsell *v.* Midland R. Co., 1 R. Co., 1 Dr. & Sm., 154; Colman Hem. & M., 130; McDonnell *v.* Eastern Counties R. Co., 10 Grand Canal Co., 3 Ir. Ch., 578; Beav., 1; Salomons *v.* Laing, 12 Beman *v.* Rufford, 6 Eng. Law & Beav., 339; Pickering *v.* Stephen- Eq. R., 106; Simpson *v.* Denison, son, L. R. 14 Eq., 322; Hutton *v.* 10 Hare, 51; Cohen *v.* Wilkinson, Scarborough Cliff Hotel Co., 13 1 Mac. & G., 481; Cherokee Iron W. R., 631, affirming S. C., Ib., Co. *v.* Jones, 52 Ga., 276; Merz Capsule Co. *v.* U. S. Capsule Co., 67 574, 2 Drew. & Sm., 514; Kerna- Fed., 414. ghan *v.* Williams, L. R. 6 Eq., 228;

the attorney-general upon the relation of a private person having no interest in the company.<sup>2</sup> So a shareholder, suing in behalf of himself and all other shareholders of a railway company, may enjoin the company from using its funds in establishing a steam packet company in connection with the railway.<sup>3</sup> So, too, the relief will be allowed to prevent a railway company from purchasing shares in another company, such an act being clearly *ultra vires*, and unauthorized by its charter.<sup>4</sup> But where the acts sought to be enjoined are neither *ultra vires* nor otherwise unlawful, they will not be restrained at the suit of the attorney-general or of persons claiming to be especially damaged thereby, upon the ground that the purpose of the incorporators in forming the corporation was to establish a monopoly in a certain line of business.<sup>5</sup>

§ 1225. **Misappropriation of funds.** In accordance with the general doctrine as above stated, it is held that a shareholder in a corporation may enjoin a misappropriation of the corporate funds by the directors in a matter which is *ultra vires* as to the corporation.<sup>6</sup> So equity will, at the suit of a shareholder in a corporation, enjoin its officers from applying its funds in the prosecution of a suit not instituted by the corporation. And the relief may be allowed in such case, even though the act enjoined has been sanctioned by a resolution of a

<sup>2</sup> *Attorney-General v. Great N. R. Co.*, 1 Dr. & Sm., 154. It was asserted by Vice Chancellor Wood in this case to be a "principle of public policy, that where parliament has authorized a company to raise a large capital for a specific purpose, the privilege confers no right upon the company to employ its capital in competition with the general public upon speculations of a different kind."

<sup>3</sup> *Colman v. Eastern Counties R. Co.*, 10 Beav., 1.

<sup>4</sup> *Salomons v. Laing*, 12 Beav., 339; *Hazlehurst v. Savannah, G. & N. A. R. Co.*, 43 Ga., 13.

<sup>5</sup> *Attorney-General v. American Tobacco Co.*, 55 N. J. Eq., 352, 36 Atl., 971.

<sup>6</sup> *Cherokee Iron Co. v. Jones*, 52 Ga., 276; *Pickering v. Stephenson*, L. R. 14 Eq., 322. See also *Smith v. Bangs*, 15 Ill., 399; *Simpson v. Denison*, 10 Hare, 51; *Sears v. Hotchkiss*, 25 Conn., 171.

majority of the shareholders, since in a matter which is *ultra vires* the majority have no power to bind the minority.<sup>7</sup>

§ 1226. **Issue of preferred stock; arbitration concerning contracts *ultra vires*.** Equity may, also, at the suit of dissatisfied shareholders who have not assented thereto, enjoin the directors of a corporation from issuing shares of preferred stock in accordance with the action of a meeting of shareholders, when such action is unauthorized and *ultra vires*.<sup>8</sup> But a shareholder who has acquiesced for a series of years in the issuing of such preferred stock, the shares having passed meantime into the hands of innocent purchasers, will be denied relief by injunction.<sup>9</sup> A shareholder is entitled to the aid of an injunction to restrain the corporation from proceeding to arbitration concerning alleged breaches of contracts which are *ultra vires* as to the corporation. In such case the relief is proper upon the general principle that equity may, at the suit of a shareholder, enjoin the directors of a corporation from acting in excess of their corporate powers.<sup>10</sup>

§ 1227. **Lease or sale of entire property enjoined; sale in violation of anti-trust laws; corporation may enjoin; good faith of plaintiffs.** Equity has jurisdiction upon a suit by shareholders of an incorporated company to interfere by injunction and will enjoin a transfer or lease of all the property of the corporation, such act being in excess of the corporate powers and clearly illegal.<sup>11</sup> So the minority shareholders of a going, prosperous corporation, able to attain the objects of its creation, may enjoin the directors from leasing and transferring, and the majority shareholders from voting to ratify such lease or transfer of, all the property of the company to

<sup>7</sup> Kernaghan v. Williams, L. R. 6 Eq., 228.

<sup>8</sup> Hutton v. Scarborough Cliff Hotel Co., 13 W. R., 631, affirming S. C., *ib.*, 574, 2 Drew. & Sm., 514.

<sup>9</sup> Kent v. Quicksilver M. Co., 78 N. Y., 159.

<sup>10</sup> Maunsell v. Midland R. Co., 1 Hem. & M., 130.

<sup>11</sup> McDonnell v. Grand Canal Co., 3 Ir. Ch., 578.



another corporation, such a disposition of the business and property of the organization being, in the absence of statutory authority, a violation of the right of the non-assenting shareholders to have the corporate affairs managed in the interest of the shareholders, and by the directors and agents appointed by them.<sup>12</sup> And a shareholder may enjoin the corporation and its officers from winding up the business of the organization and selling and transferring its property and assets to another corporation under a contract or agreement which is in violation of the anti-trust laws of the state. In such case, since the consummation of the agreement would render the corporation liable to a forfeiture of its charter, the injury to the shareholder is regarded as of so irreparable a nature as to entitle him to the interposition of equity by injunction.<sup>13</sup> And where two corporations have entered into a contract by which one is to transfer all its property and business to the other in return for stock in the other to be held by the first, such an agreement is *ultra vires* and the first corporation may enjoin the other from attempting to enforce it.<sup>14</sup> In every case, however, where injunctive relief is sought by share-

<sup>12</sup> *Small v. Minneapolis E.-M. Co.*, 45 Minn., 264, 47 N. W., 797; *Forrester v. B. & M. Co.*, 21 Mont., 544, 55 Pac., 229, 353. In the latter case the court say: "At common law, neither the directors nor a majority of the stockholders have power to sell or otherwise transfer all the property of a going, prosperous corporation, able to achieve the objects of its creation, as against the dissent of a single stockholder. This doctrine is firmly established by the authority of adjudicated cases, and rests upon soundest principles." The court also distinguish between the case of a live, prosperous corporation, and one where the organization is

in hard straits and unable to prosecute its business further or attain the objects of its creation.

<sup>13</sup> *Harding v. American Glucose Co.*, 182 Ill., 551, 55 N. E., 577, 74 Am. St. Rep., 189. In *Coquard v. National Linseed Oil Co.*, 171 Ill., 480, 49 N. E., 563, it was held that the shareholder could not ask for injunctive and other equitable relief with a view to winding up the affairs of the corporation upon the ground that it was organized in violation of the anti-trust laws of the state, since, by taking stock in the company, he became a participant in the wrongs complained of.

<sup>14</sup> *Merz Capsule Co. v. U. S. Capsule Co.*, 67 Fed., 414.

holders, the court will look to the *bona fides* of the plaintiffs seeking its extraordinary aid. And if it is apparent that they were not shareholders at the time the transactions complained of occurred, and that they have purchased their shares for a merely nominal consideration for the purpose of obtaining the injunction sought, it may properly refuse to interfere in their behalf.<sup>15</sup>

§ 1228. **Plaintiffs must be actual shareholders; pledgees denied relief.** It is, however, important to observe that to warrant relief by injunction against illegal or fraudulent proceedings of corporate officers, in excess of the powers conferred by their charter, plaintiffs invoking the extraordinary aid of the court must occupy the relation of shareholders to the corporation. And mere subscribers to the capital stock, who have not complied with the terms of their subscription, do not sustain such a relation toward the corporation as to entitle them to the aid of an injunction.<sup>16</sup> But an injunction against holding a meeting to increase the indebtedness of the corporation has been refused when sought by pledgees of shares not having the absolute title.<sup>17</sup>

§ 1229. **Acquiescence of shareholders as an estoppel; corporation enjoined from resuming possession of property unlawfully leased.** While a court of equity may, as is thus shown, interfere by injunction at the suit of a shareholder in a corporation to restrain the corporate officers from acting *ultra vires*, or transcending their well defined powers, yet the consent and acquiescence of the complaining shareholders may be such as to deprive them of relief in equity. Thus, shareholders in a railway company who have acquiesced in the making of a contract for completing the railway, to be paid for in a certain manner, will not be permitted after the completion of the work to enjoin payment in

<sup>15</sup> McDonnell v. Midland G. W. R. Co., 3 Ir. Ch., 578.

<sup>17</sup> Becher v. Wells F. M. Co., 1 McCrary, 62; S. C., 1 Fed., 276.

<sup>16</sup> Busey v. Hooper, 35 Md., 15.

accordance with the contract upon the ground that the proceedings were *ultra vires*. And the relief is properly refused in such case upon the ground that, having received the benefit of the contract and having acquiesced therein, they are estopped in equity from setting up the doctrine of *ultra vires* as a ground for enjoining such payment.<sup>18</sup> So shareholders in a railway company will not be permitted to enjoin the consummation by the company of the purchase of another railway, when it is apparent that the original purchase was made with the full knowledge of plaintiffs, and without objection on their part; especially when it appears that the granting of the injunction would result in great and irreparable injury to others.<sup>19</sup> But an injunction will lie to prevent one of two contracting corporations from forcibly resuming possession of property which it had leased to the other, although the lease is *ultra vires*, when the defendant has received compensation therefor, leaving it to institute legal proceedings for the recovery of the property and for an accounting.<sup>20</sup>

§ 1229 a. **Right of state to enjoin *ultra vires* acts.** Upon the question as to the right of the state, as party complainant, to maintain a bill in equity for the purpose of enjoining illegal and *ultra vires* acts of corporations, there has been some conflict of authority. The better doctrine, however, and the one which has the support of the later adjudications, is that the state, proceeding either in its own name or upon information filed by the attorney-general, may resort to the aid of equity to restrain illegal and *ultra vires* acts which are threatened by corporations within its jurisdiction, provided those acts are of such a nature as to harm the state in its property rights or

<sup>18</sup> *Hazlehurst v. Savannah, G. & Atlantic & P. T. Co. v. Union Pacific N. A. R. Co.*, 43 Ga., 13. R. Co., 1 McCrary, 541; S. C., 1

<sup>19</sup> *Cozart v. Georgia Railroad & Banking Co.*, 54 Ga., 379. Fed., 745; *Western Union T. Co. v. St. Joseph & W. R. Co.*, 1 Mc-

<sup>20</sup> *American U. T. Co. v. Union Pacific R. Co.*, 1 McCrary, 188; At-

to result in great injury to the public.<sup>21</sup> The relief is granted in such cases notwithstanding the fact that a remedy may exist by *quo warranto*. The remedy by injunction, although a harsh one, is regarded as less severe than a proceeding in the nature of *quo warranto* brought for the purpose of forfeiting the charter of the corporation, it being considered better merely to check the corporation in the consummation of the wrong than to put an end to its right to exist by decreeing a forfeiture of its charter. Thus, the state may enjoin a corporation from holding and voting the stock of two competing street railway companies as the consummation of an agreement entered into for the purpose of preventing competition and establishing a monopoly contrary to the provisions of the constitution of the state.<sup>22</sup> So a court of equity has jurisdiction, upon a bill filed by the state, to enforce by injunction the anti-trust laws of the state by restraining a foreign corporation which has been guilty of violating the provisions of the law from further transacting business in the state.<sup>23</sup>

<sup>21</sup> *Trust Co. v. Georgia*, 109 Ga., 715, 59 S. W., 1033, 78 Am. St. Rep., 736, 35 S. E., 323, 48 L. R. A., 520; 941; *Attorney-General v. Delaware Louisville & N. R. Co. v. Commonwealth*, 97 Ky., 675, 31 S. W., 476, 631. And see, *ante*, § 621*d*.  
<sup>22</sup> *Trust Co. v. Georgia*, 109 Ga., 715, 59 S. W., 1033, 78 Am. St. Rep., 736, 35 S. E., 323, 48 L. R. A., 520.  
<sup>23</sup> *State v. Schlitz Brewing Co.*, 104 Tenn., 715, 59 S. W., 1033, 78 Am. St. Rep., 941.

## IV. CORPORATE ELECTIONS.

- § 1230. Injunctions against corporate elections of American origin.  
 1231. Illustrations of the relief.  
 1232. Further illustrations.  
 1233. Conspiracy by minority of shareholders.  
 1234. When relief refused.  
 1235. Equity does not determine questions of title to corporate office; exceptions.

§ 1230. **Injunctions against corporate elections of American origin.** While the propriety of equitable interference by injunction with the election of officers of private corporations has been frequently criticized, and with no inconsiderable show of justice, the jurisdiction itself, although sparingly exercised, is too firmly established to be readily shaken without the intervention of legislative authority. The jurisdiction is, however, almost entirely of American growth, the English authorities affording few instances of its exercise. It seems to have been early recognized by the New York Court of Chancery, although the right to relief was denied under the circumstances of the particular case.<sup>1</sup>

<sup>1</sup> *Haight v. Day*, 1 Johns. Ch., 18, decided in 1814. The case was that of a bill by subscribers to the capital stock of a bank, praying an injunction against the commissioners appointed to receive subscriptions and to effect the organization, to restrain them from proceeding to an election of officers. The bill charged that the commissioners had arbitrarily, and without plaintiffs' consent, distributed a large number of shares of stock among themselves, their relatives and friends, in fraud of the rights of plaintiffs. The charges of fraud being fully negatived by the answer, a preliminary injunction which had been granted upon the

filing of the bill was dissolved upon motion and hearing. Chancellor Kent, without expressly deciding the question of jurisdiction, seems to have tacitly recognized it as within the power of the court to grant preventive relief in such cases; and it may, perhaps, be inferred from the language of his opinion that there were previous, although unreported, instances of the exercise of the jurisdiction in New York. In dissolving the injunction the Chancellor seems to have been governed chiefly by considerations of the extreme hardship which might result from its continuance, since the prevention of the election at that stage of the

And in a later case in the same court, where it was also sought upon grounds of fraudulent and improper conduct to enjoin the commissioners appointed to receive subscriptions to the capital stock of a corporation and to complete its organization, from holding an election for directors, the power of the court to grant the desired relief was clearly and emphatically asserted, although the relief was denied, chiefly because the principal averments of the bill were made only upon information and belief; and because, also, the injunction, if granted, would seriously affect the rights of other shareholders not before the court and who had no opportunity to be heard.<sup>2</sup>

§ 1231. **Illustrations of the relief.** Where the directors of a corporation fraudulently transfer to themselves certain shares of capital stock for the purpose of retaining themselves in office

organization would operate as a dissolution of the body corporate; and the charges of fraud and improper exercise of official discretion upon the part of defendants being fully negatived by the answer, the court could not do otherwise than dissolve the injunction.

<sup>2</sup> Walker v. Devereaux, 4 Paige, 229, decided in 1833. Upon the question of jurisdiction, Chancellor Walworth used the following language: "This court unquestionably has the power to prevent this election by an injunction operating upon the commissioners, restraining them from acting as inspectors of the election. And in a case of imperious necessity, where the complainant did not know and could not ascertain the names of the other stockholders, I might consider it my duty to prevent a great and irreparable injury to him, although the effect of that in-

terference might be to destroy the charter of a corporation. But, in the exercise of such a power, the court should require ample security from the complainant to pay all damages other persons might sustain by the granting of the injunction, if it should be subsequently ascertained that it was not warranted by the real facts of the case. The oath of the complainant, that he is informed and believes the existence of the fact, may be a sufficient ground to authorize the issuing of an injunction against a defendant who has had an opportunity to deny the allegation if it is unfounded, but it is not sufficient to justify the court in destroying or injuring the rights of others who have not had any opportunity of being heard by themselves, or by those who are under a legal obligation to protect their rights."

by controlling the elections, such transfer being made by them under a resolution passed at a directors' meeting held beyond the borders of the state, their action will be treated as fraudulent and void, and they may be enjoined from voting the shares thus fraudulently transferred. And in such case, the acceptance by a shareholder of a dividend upon his stock would seem not to be such a ratification of the illegal action of the directors as to estop such shareholder from relief in equity by injunction.<sup>3</sup> So a court of equity may, at the suit of shareholders, enjoin the directors of a corporation from issuing new shares of stock for the purpose of controlling an approaching meeting of shareholders.<sup>4</sup> And if, in such case, the new shares have already been issued, the holding of the meeting may be enjoined.<sup>5</sup>

§ 1232. **Further illustrations.** It is also held that where the charter of a banking company prescribes certain rules and limitations for voting upon shares of its capital stock, fixing a maximum number of votes as the limit to which each shareholder shall be entitled, shareholders who fraudulently procure shares, which are pledged by them to the bank as security for advances, to be colorably transferred to other persons without consideration, taking from such transferees powers of attorney to vote the stock thus transferred, may be enjoined from voting such shares. And the ground for relief in such case is found in the fact that the action of defendants constitutes a fraud upon the complaining shareholders, being in violation of the spirit of the charter and in derogation of their chartered rights.<sup>6</sup> And under similar provisions in a charter, upon a bill alleging that defendants have made colorable transfers of stock to different persons with the fraudulent intent of evading the charter by increasing

<sup>3</sup> *Hilles v. Parish*, 1 McCart., 380.

<sup>5</sup> *Punt v. Symons*, (1903) 2 Ch.,

<sup>4</sup> *Fraser v. Whalley*, 2 Hem. & 506.

M., 10.

<sup>6</sup> *Campbell v. Poultney*, 6 Gill & J., 94.

the number of votes which they can control, an injunction may be allowed against the voting of such shares, either in person or by any power of attorney from the fraudulent transferees, and to restrain the judges of election from receiving such votes. And in such case it is held that a statute regulating the canvassing of votes at corporate elections, and prescribing an oath to be administered to the voter or to a proxy, as well as fixing the mode of voting by proxy, does not afford such a remedy at law as to oust the jurisdiction of equity, such statutory regulations being merely safeguards to promote a fair election and not in themselves affording a remedy at law in the technical sense of the term.<sup>7</sup>

§ 1233. **Conspiracy by minority of shareholders.** Upon a bill by plaintiffs occupying the relation of trustees, and holding a large number of shares of stock under an agreement defining their trust and authorizing them to vote the shares so held, the bill charging defendants, having control of a minority of shares with conspiring together to obtain an *ex parte* injunction against plaintiffs, restraining them from voting the shares held by them, and thus enabling defendants to elect a board of directors against the wishes of a majority of the shareholders, the case was regarded as presenting such elements of irreparable injury as to warrant an injunction, the principal averments of the bill not being denied.<sup>8</sup>

§ 1234. **When relief refused.** A court of equity will not, however, upon a bill by a minority of the board of directors of a corporation against the majority, charging them with having fraudulently issued stock to a large amount for the purpose of controlling an election, enjoin one of the defendant directors from voting an excess of stock charged to be wrongfully held by him, when the corporation has taken no steps to cancel such excess or to declare it void, and when no irrep-

<sup>7</sup> Webb v. Ridgely, 38 Md., 364.

<sup>8</sup> Brown v. Pacific Mail Steamship Co., 5 Blatch., 525.



arable or permanent injury is shown as likely to result from such defendant voting the excess of stock.<sup>9</sup>

§ 1235. **Equity does not determine questions of title to corporate office; exceptions.** It is also to be observed that courts of equity do not entertain jurisdiction over corporate elections for the purpose of determining questions pertaining to the right or title to corporate offices, since such questions are properly cognizable only in courts of law, the appropriate remedy being by proceedings at law in the nature of a *quo warranto*.<sup>10</sup> Nor is the fact that relief is claimed upon the ground of fraud sufficient to warrant a departure from the rule, or to justify a court of equity, in such case, in granting relief by injunction.<sup>11</sup> Where, however, the question of the right or title to corporate office arises as a mere incident to the determination of a case involving property rights of which equity has jurisdiction the rule forbidding injunctive relief does not apply.<sup>12</sup> Thus, where defendants, claiming to be the directors of a railroad corporation, had forcibly seized possession of the property of the road and were using it in such a way as to cause irreparable injury to property rights, it was held that equity might properly interfere for the protection of such rights, and the fact that the court was com-

<sup>9</sup> Reed v. Jones, 6 Wis., 680.

<sup>10</sup> Hartt v. Harvey, 32 Barb., 55; Jenkins v. Baxter, 160 Pa. St., 199, 28 Atl., 682; Bedford Springs Co. v. McMeen, 161 Pa. St., 639, 29 Atl., 99; Carmel N. G. & I. Co. v. Small, 150 Ind., 427, 50 N. E., 476. And see Mickles v. Rochester City Bank, 11 Paige, 118; People v. Conklin, 5 Hun, 452; Wilkie v. Rochester & S. L. R. Co., 12 Hun, 242; Sherman v. Clark, 4 Nev., 138. See also Hussey v. Gallagher, 61 Ga., 86; Harris v. Pounds, 64 Ga., 121; Standard Gold Mining Co. v. Byers, 31 Wash., 100, 71 Pac., 766. But

in Nebraska a contrary rule prevails and it is held that shareholders of a corporation may enjoin persons claiming to have been elected directors from acting as such, upon the ground that they were not legally elected. Humboldt D. P. Association v. Stevens, 34 Neb., 528, 52 N. W., 568, 33 Am. St. Rep., 654; Reynolds v. Brinden-thal, 57 Neb., 280, 77 N. W., 658.

<sup>11</sup> Hartt v. Harvey, 32 Barb., 55.

<sup>12</sup> Johnston v. Jones, 23 N. J. Eq., 215; Chicago Marconi Co. v. Boggiano, 202 Ill., 312, 67 N. E., 17. And see, *post*, § 1315a.

pelled incidentally to determine the question as to the validity of the election of the directors, did not deprive the court of its jurisdiction. But the decision in such case is merely for the purpose of the pending proceeding and it does not determine the ultimate right to the office or vacate it if the claimant is already in possession.<sup>13</sup> Indeed, the only ground upon which the jurisdiction of equity in restraint of corporate elections can be properly based is the protection of the property rights of shareholders, and it is believed that the limit to the exercise of the jurisdiction is found in such measure of preventive relief as will prevent injury to those property rights, without extending it to questions of title to corporate offices, the determination of which is to be sought in a legal rather than in an equitable forum.

<sup>13</sup> *Johnston v. Jones*, 23 N. J. Eq., 215.

## CHAPTER XXI.

### OF INJUNCTIONS PERTAINING TO MUNICIPAL CORPORATIONS.

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#### I. NATURE AND GROUNDS OF THE JURISDICTION.

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§ 1236. **The jurisdiction founded in trust.** The jurisdiction of courts of equity to restrain the proceedings of municipal corporations, at the suit of citizens and taxpayers, where such proceedings encroach upon private rights and are productive of irreparable injury, may be regarded as well established.<sup>1</sup> In the exercise of this jurisdiction the courts proceed upon substantially the same principles which govern their interference in cases of trusts, a municipal corporation being re-

<sup>1</sup> *Christopher v. Mayor*, 13 Barb., Wis., 485; *Smith v. Appleton*, 19 667; *Milhau v. Sharp*, 15 Barb., Wis., 468; *Dudley v. Trustees*, 12 193; *Stuyvesant v. Pearsall*, Ib., B. Mon., 610; *Lutes v. Briggs*, 5 244; *Lumsden v. Milwaukee*, 8 Hun, 67.

garded in equity as charged with and made the depository of a public trust, and thus amenable to the jurisdiction of equity for a breach of that trust.<sup>2</sup> Thus, a city government, being a municipal corporation entrusted with the care of the city property, if it disposes of property, or grants privileges or franchises, without consideration and with no profit to the city, where a proper disposition of such privileges would inure largely to the benefit of the city, such a breach of trust is committed as calls for the interposition of equity by injunction.<sup>3</sup> And when an act about to be committed by a municipal corporation is clearly illegal, and its necessary effect will be to impose heavy burdens upon the property of citizens and taxpayers, a court of equity is warranted in interfering by injunction for the prevention of such act.<sup>4</sup> In such case a more prompt and efficacious remedy is demanded than is afforded by the tardy action of courts of law, and equity alone can

<sup>2</sup> *Milhau v. Sharp*, 15 Barb., 193; *Stuyvesant v. Pearsall*, Ib., 244.

<sup>3</sup> *Milhau v. Sharp*, 15 Barb., 193; *Stuyvesant v. Pearsall*, Ib., 244.

<sup>4</sup> *Christopher v. Mayor*, 13 Barb., 567; *Hays v. Jones*, 27 Ohio St., 218; *Davenport v. Kleinschmidt*, 6 Mont., 502, 13 Pac., 249; *Doan v. Board of Commissioners*, 3 Idaho, 38, 26 Pac., 167. But in California it is held that a board of county supervisors will not be enjoined at the suit of a taxpayer from erecting a building for which they have no authority, since the act being illegal and unauthorized, plaintiff can not be injured thereby, and an expenditure for an unauthorized work, if made, can not become a charge upon his property. *Linden v. Case*, 46 Cal., 171. And it is held, upon the same ground, that a taxpayer can not enjoin a board of county supervisors from audit-

ing and allowing fraudulent claims against a county. *Merriam v. Board of Supervisors*, 72 Cal., 517, 14 Pac., 137. But the force of these authorities has been greatly shaken by the case of *Bradford v. San Francisco*, 112 Cal., 537, 44 Pac., 912, in which it was held that where the revenues of a city and county necessary for a particular year have been determined and the revenues collected and expended before the expiration of the year, and the municipal authorities, for the purpose of providing for the wants of the municipality for the balance of the year, are incurring debts and liabilities to be met and discharged from the revenues of a subsequent year, a taxpayer is entitled to an injunction restraining such unauthorized action upon the part of the municipal authorities.

administer the necessary relief by the exercise of its extraordinary power by injunction.

§ 1237. **Misappropriation of municipal funds enjoined; distinction between misappropriation by local officer and state official.** The most frequent ground of application for relief by injunction against municipal corporations is for the prevention of an illegal or unauthorized diversion of public funds belonging to the municipality. The foundation of the relief which is invoked in cases of this nature rests in the doctrine of trusts, and the relief is freely granted in aid of citizens and taxpayers, as to whom the officers of the municipality sustain the relation of trustees. And while courts of equity are averse to any interference with the proceedings of municipal officers while acting within the scope of their authority, and while they will not by injunction control the judgment or revise the action of municipal bodies in matters resting within their own well defined jurisdiction, they will yet relieve in behalf of citizens and taxpayers against illegal action on the part of such bodies, without authority of law and in excess of the corporate powers. An injunction will, therefore, lie to restrain an illegal diversion, or a misappropriation of the public funds to purposes unauthorized by law, the action of the municipal authorities in making such appropriation being regarded both in the nature of a breach of their official and public trust, and also as wholly void.<sup>5</sup> So under

<sup>5</sup> *Lutes v. Briggs*, 5 Hun, 67; *Rep.*, 222; *Holden v. City of Alton*, 179 Ill., 318, 53 N. E., 556; *Patton v. Stephens*, 14 Bush., 324; *Brown v. Concord*, 56 N. H., 375; *Dent v. Cook*, 45 Ga., 323; *Hudson v. Mayor*, 64 Ga., 286; *Keen v. Mayor*, 101 Ga., 588, 29 S. E., 42; *Mayor v. Putnam*, 103 Ga., 110, 29 S. E., 602; *City of Atlanta v. Stein*, 111 Ga., 789, 36 S. E., 932, 51 L. R. A., 335; *White v. Commissioners*, 13 Ore., 317, 10 Pac., 484; *Avery v.*

*Roberts v. Mayor*, 5 Ab. Pr., 41; *Colton v. Hanchett*, 13 Ill., 615; *Perry v. Kinnear*, 42 Ill., 160; *Sherlock v. Village of Winnetka*, 59 Ill., 389; *S. C. upon final hearing*, 68 Ill., 530; *City of Chicago v. McCoy*, 136 Ill., 344, 26 N. E., 363, 11 L. R. A., 413; *City of Chicago v. Nichols*, 177 Ill., 97, 52 N. E., 359; *Adams v. Brenan*, 177 Ill., 194, 52 N. E., 314, 42 L. R. A., 718, 69 Am. St.

a statute authorizing a taxpayer to maintain an action to restrain any illegal official act upon the part of municipal officers, a town officer may be enjoined from appropriating

Job, 25 Ore., 512, 36 Pac., 293; Brownfield v. Houser, 30 Ore., 534, 49 Pac., 843; Burness v. Multnomah County, 37 Ore., 460, 60 Pac., 1005; Crampton v. Zabriskie, 101 U. S., 601; Sligh v. Bowers, 62 S. C., 409, 40 S. E., 885; Delano Land Company's Appeal, 103 Pa. St., 347; Peter v. Prettyman, 62 Md., 566; Hospers v. Wyatt, 63 Iowa, 264, 19 N. W., 204; Snyder v. Foster, 77 Iowa, 638, 42 N. W., 506; Cascaden v. City of Waterloo, 106 Iowa, 673, 77 N. W., 333; Warren Co. Agricultural Joint Stock Company v. Barr, 55 Ind., 30; Rothrock v. Carr, 55 Ind., 334; Board of Commissioners v. Gillies, 138 Ind., 667, 38 N. E., 40; Jacksonport v. Watson, 33 Ark., 704; Barnes v. Williams, 53 Ark., 205, 13 S. W., 845; Austin v. Coggeshall, 12 R. I., 329; Frederick v. Douglas County, 96 Wis., 411, 71 N. W., 798; Webster v. Douglas County, 102 Wis., 181, 77 N. W., 885, 78 N. W., 451, 72 Am. St. Rep., 870; Mueller v. Eau Claire County, 108 Wis., 304, 84 N. W. 430; Siegel v. Town of Liberty, 111 Wis., 470, 87 N. W., 487; Kircher v. Pederson, 117 Wis., 68, 93 N. W., 813; Engstad v. Dinnie, 8 N. Dak., 1, 76 N. W., 292; Storey v. Murphy, 9 N. Dak., 115, 81 N. W., 23; Roberts v. City of Fargo, 10 N. Dak., 230, 86 N. W., 726; Inge v. Board of Public Works, 135 Ala., 187, 33 So., 678; Savidge v. Village of Spring Lake, 112 Mich., 91, 70 N. W., 425; Grannis v. County Commissioners, 81 Minn., 55, 83 N. W., 495; Solomon v. Fleming, 34 Neb., 40, 51 N. W., 304; Kennedy v. Montgomery County, 98 Tenn., 165, 38 S. W., 1075; Chamberlain v. City of Tampa, 40 Fla., 74, 23 So., 572; Laughlin v. Board of Commissioners, 3 New Mex., 264, 5 Pac., 817. See also Tash v. Adams, 10 Cush., 252. And see Beauchamp v. Board of Supervisors, 45 Ill., 274; Schumm v. Seymour, 9 C. E. Green, 143; English v. Smock, 34 Ind., 115; State v. Commissioners, 39 Ohio St., 58. But in Massachusetts it is held, contrary to the overwhelming and otherwise unanimous authorities above cited, that a court of equity has no jurisdiction under general principles of equity and in the absence of direct statutory enactment to entertain a bill filed by taxpayers to restrain the alleged illegal appropriation of public money or the carrying out of an alleged illegal contract. Baldwin v. Wilbraham, 140 Mass., 459, 4 N. E., 829; Steele v. Municipal Signal Co., 160 Mass., 36, 35 N. E., 105. It is believed that these are the only authorities in which the existence of the jurisdiction has ever been denied or even questioned. As to the taxing and apportionment of costs in the class of cases under discussion, see City of Chicago v. McCoy, 136 Ill., 344, 26 N. E., 363, 11 L. R. A., 413; City of Chicago v. Nichols, 177 Ill., 97, 52 N. E., 359.

to his own use, out of the funds of the town in his possession, the amount of certain fees claimed by him, but which have not been audited or allowed by the proper officers in accordance with the laws of the state.<sup>6</sup> But a distinction has been drawn between the misappropriation of public funds when committed by local municipal officers and the misapplication of such funds by state officers; and in the latter case it has been held that a taxpayer can not maintain a bill for an injunction since this would be in effect an interference by an individual with the sovereign power of the state.<sup>7</sup>

§ 1238. **The doctrine illustrated.** Illustrations of the doctrine as thus stated are manifold, but the governing principle underlying them all is one and the same. Thus, an appropriation by a board of county commissioners of the county funds in aid of a private corporation, which is made without authority of law and which is therefore void, may be enjoined at the suit of a taxpayer.<sup>8</sup> So a donation of public funds by a board of county commissioners, without legal authority, in aid of the erection of a school house, will be restrained upon a bill by citizens and taxpayers of the county.<sup>9</sup> So where a town has voted to loan its surplus revenue in an illegal and unauthorized manner, its trustees may be enjoined from compliance with such vote.<sup>10</sup> And upon a bill by citizens and taxpayers it is proper to enjoin, until a final hearing upon the merits, the payment of county bonds

<sup>6</sup> *Warrin v. Baldwin*, 105 N. Y. 534, 12 N. E., 49.

<sup>7</sup> *Jones v. Reed*, 3 Wash., 57, 27 Pac., 1067. Since the fundamental reason for allowing a taxpayer a standing in equity to prevent the misappropriation of public funds is to protect him from an increased burden of taxation, it is difficult to perceive how this distinction can be justified, since the individual taxpayer is affected in

precisely the same manner, although perhaps somewhat differently in degree, in the one case as in the other. See the vigorous dissenting opinion of Hoyt, J., in the case last cited.

<sup>8</sup> *Warren Co. Agricultural Joint Stock Company v. Barr*, 55 Ind., 30.

<sup>9</sup> *Rothrock v. Carr*, 55 Ind., 334.

<sup>10</sup> *Pope v. Inhabitants of Halifax*, 12 Cush., 410.



which are alleged to have been issued without authority of law in aid of the building of a jail.<sup>11</sup> So the misappropriation of funds by the common council of a village, in the purchase of lands and the erection of buildings thereon for private purposes, constitutes such a breach of trust as to entitle taxpayers to relief by injunction.<sup>12</sup> And an illegal expenditure of public funds by a municipal corporation in payment of counsel fees in a proposed litigation may be enjoined, such expenditure being entirely beyond the power of the corporate authorities.<sup>13</sup> So the authorities of a county may be enjoined from paying out public funds to an attorney as compensation for legal services where such employment is rendered illegal by the fact that the county has a regularly paid and employed county attorney.<sup>14</sup> So the relief will be granted to restrain city officials from paying to the city attorney any salary in excess of the amount provided by the ordinance in existence at the time of his election, under an ordinance which attempts to raise his salary while in office.<sup>15</sup> Upon similar principles equity may enjoin an illegal and unauthorized appropriation of public money by a municipality, such as the payment of a reward for the apprehension of a defaulting city official and expenses incurred in procuring his arrest and extradition from a foreign country.<sup>16</sup> So where money which has been properly and legally assessed and collected for a lawful purpose is diverted to a purpose foreign to that for which it was intended, equitable relief may properly be extended. Thus, when money has been raised for the improvement of streets by assessment upon the property owners benefited thereby, but the municipal authorities are proceeding to appropriate it for a purpose not war-

<sup>11</sup> *Dent v. Cook*, 45 Ga., 323.

96 Wis., 411, 71 N. W., 798.

<sup>12</sup> *Sherlock v. Village of Winnetka*, 59 Ill., 389; S. C., upon final hearing, 68 Ill., 530.

<sup>15</sup> *Barnes v. Williams*, 53 Ark., 205, 13 S. W., 845.

<sup>13</sup> *Roberts v. Mayor*, 5 Ab. Pr., 41.

<sup>16</sup> *Patton v. Stephens*, 14 Bush.,

<sup>14</sup> *Frederick v. Douglas County*,

324.

ranted by the ordinance authorizing the improvement and making the assessment, property owners who have been assessed for the improvement may be relieved by injunction against such misappropriation.<sup>17</sup> And when, pursuant to an act of legislature, a fund has been collected by taxation and set apart for the payment of interest on certain city bonds, it becomes a trust fund for that purpose and its unauthorized diversion to another and different purpose may be enjoined at the suit of the bondholders.<sup>18</sup> So if a municipal corporation is about to accept and pay for a work of public improvement, which in substantial and important respects is not in accordance with the contract, the difference inuring to the benefit of the contractor at the expense of property owners, the officers of the corporation are guilty of a breach of trust amounting to a fraud, the appropriate remedy for which is an injunction to restrain such payment.<sup>19</sup>

§ 1239. **Further illustrations.** So, also, if a board of county supervisors have acted illegally and fraudulently in auditing and allowing claims in their own favor, and warrants have been drawn upon the county treasurer for their payment, the payment of such warrants may be enjoined at the suit of a taxpayer, it being averred that defendants conspired together to defraud the county by presenting and allowing fraudulent claims for pretended services.<sup>20</sup> And where the supervisors of a county are attempting to misapply the county funds an injunction is the proper remedy to prevent their action.<sup>21</sup> So where the authorities of a county attempt to appropriate and pay to a judge, as a mere gratuity, any portion of the county funds, such appropriation not being authorized by law, an injunction will be allowed to prevent

<sup>17</sup> *Lutes v. Briggs*, 5 Hun, 67. — <sup>19</sup> *Schumm v. Seymour*, 9 C. E.

<sup>18</sup> *Maenhaut v. New Orleans*, 2 Green, 143; *Carthan v. Lang*, 69 Woods, 108; *Ranger v. New Orleans*, 128; *Chaffraix v.*

*Board of Liquidation*, 11 Fed., 638. <sup>20</sup> *Andrews v. Pratt*, 44 Cal., 309.

<sup>21</sup> *Colton v. Hanchett*, 13 Ill., 615.

its payment. And where, for the purpose of evading the injunction, the supervisors rescind the first order appropriating the money, and pass a second one to effect the same result, a supplemental bill and injunction will not be required, since the first injunction covers the entire case.<sup>22</sup> So taxpayers of a school district may enjoin the collection of a tax for the payment of a judgment which has been obtained against the district by fraud and collusion with its officers.<sup>23</sup> So municipal officers may be enjoined at the suit of taxpayers from appropriating the funds of the municipality for celebrations or entertainments, in the absence of any lawful authority to devote the funds to such uses.<sup>24</sup> So equity may restrain the diversion of public funds for the purchase of water works at a price far in excess of their actual

<sup>22</sup> *Perry v. Kinnear*, 42 Ill., 160. And see *Beauchamp v. Board of Supervisors*, 45 Ill., 274. Walker, Chief Justice, pronouncing the opinion of the court in *Perry v. Kinnear*, says: "In the absence of some law authorizing the performance of the act, the board has no power to make such an appropriation. And being unauthorized and illegal, its consummation should have been restrained. By an unauthorized tax the citizen is deprived of his property without sanction of law. And bodies created for the discharge of public duties, and to aid in conducting the affairs of counties, have not been intrusted with the power to seize and appropriate the property of the people to any but legal purposes. The inhabitants of the state have been secured in the possession and enjoyment of their property against as well the officer created by law as private persons. The former can only exercise pow-

er to deprive him of it, in the mode and for the purposes constitutionally authorized by law. If his property may be seized for one illegal purpose it may for another, and all protection ceases. The power to levy and collect taxes is a power to take from the citizen his money, with or without his consent, and when it is attempted to exercise such a power, courts will not hesitate to afford preventive relief. And, as this was an attempt to exercise unauthorized powers and wrongfully to appropriate the money of the citizens of the county, the court below should have overruled the motion to dissolve the injunction. And for this error the decree of the court below must be reversed and the cause remanded."

<sup>23</sup> *Nevil v. Clifford*, 55 Wis., 161, 12 N. W., 419.

<sup>24</sup> *Austin v. Coggeshall*, 12 R. I., 329; *Tash v. Adams*, 10 Cush., 252.

value, the plant itself being wholly inadequate and insufficient to supply the needs of the community.<sup>25</sup> So a taxpayer may enjoin a municipality from conveying away its property in a manner not contemplated by law and for a purpose beyond its power to entertain. Thus, a city may be enjoined from conveying certain lands to the county, in consideration of the latter removing the county seat and relocating it within the city.<sup>26</sup> And where the municipal authorities are about to establish a dispensary for the sale of liquor under an ordinance passed for that purpose and are about to contract debts under the ordinance, the carrying out of such a scheme was held to be beyond the charter power of the municipality and relief by injunction was accordingly granted.<sup>27</sup> And where a city, in connection with the operation of a system of municipal water works, had begun to conduct a general plumbing business, in the conduct of which it was selling supplies and materials to private citizens and was doing contract work in placing them on their premises, such acts, being not incidental or necessary to the performance of the corporate functions, were held to be beyond the power of the municipality and were accordingly enjoined at the instance of a taxpayer. And the relief was granted notwithstanding that the city might be operating the business at a profit, since the time might come when, through fraud and mismanagement, the profits might cease.<sup>28</sup>

§ 1239 *a*. **Laches as a bar to relief.** As to the effect of the laches of a taxpayer upon his right to invoke the aid of equity to restrain the misappropriation of public funds, there

<sup>25</sup> *Avery v. Job*, 25 Ore., 512, 36 Pac., 293.

<sup>26</sup> *Brockman v. City of Creston*, 79 Iowa, 587, 44 N. W., 822.

<sup>27</sup> *Mayor v. Putnam*, 103 Ga., 110, 29 S. E., 602; *Barnesville v. Murphy*, 113 Ga., 779, 39 S. E., 413. In this case the injunction was granted against the further operation of the dispensary but was denied

against the payment of obligations incurred by the city for the purchase of liquor used in connection with the dispensary. And see, *post*, § 1301, as to denying relief against the maintenance of such an institution.

<sup>28</sup> *Keen v. Mayor*, 101 Ga., 588, 29 S. E., 42.

has been some conflict of authority. The earlier cases applied the general rule of equity which almost universally denies relief where the aggrieved party has been guilty of unreasonable delay in the assertion of his rights.<sup>29</sup> The later authorities, however, have made an exception to the general rule in cases where relief is thus sought against the diversion of public funds and they accordingly hold that the laches of the taxpayer in seeking relief in such cases is no bar to an injunction, since the municipal officers are plainly exceeding their legal authority, and all persons dealing with them are presumed to know the limitations upon their authority, and hence to act at their peril.<sup>30</sup> In view of the serious consequences which might result from permitting a public official who is admittedly engaged in the misuse of public funds to shield himself in his wrong doing by pleading the delay of the taxpayer in seeking relief, it is believed that the doctrine as supported by the later authorities represents the better and safer rule.

§ 1240. **Discretion of municipal officers not interfered with; illustrations of the doctrine.** An important modification of the doctrine of equitable interference with the proceedings of municipal corporations is found in the limitations and restrictions which are placed upon the jurisdiction in all cases where it is sought to interfere with or control the judgment or discretion of municipal bodies upon matters properly entrusted to them by law. A municipal corporation being a political body, clothed with certain legislative and discretionary powers, equity is ordinarily averse to interfering by injunction with the exercise of those powers at the suit of a private citizen. And no principle of equity jurisprudence is better established than that courts of equity will not sit in review of the proceedings of subordinate political or municipal tribunals, and that where matters are left to the discretion of such bodies, the exercise of

<sup>29</sup> *Tash v. Adams*, 10 Cush., 252; 329; *Storey v. Murphy*, 9 N. Dak., 115, 81 N. W., 23. And see *Fuller v. Inhabitants of Melrose*, 1 Allen, 166. *Schumm v. Seymour*, 9 C. E.

<sup>30</sup> *Austin v. Coggeshall*, 12 R. I., Green, 143.

that discretion in good faith is conclusive, and will not, in the absence of fraud, be disturbed.<sup>31</sup> And the fact that the court would have exercised the discretion in a different manner will not warrant it in departing from the rule. Thus, a mere difference of opinion between a court of equity and a municipal corporation as to the proper rate of ferriage to be charged, where the corporation is by its charter vested with the control of certain ferries, and, as incidental thereto, the right of establishing a tariff of prices, will not justify the court in granting an injunction.<sup>32</sup> And when it is made by law the duty of the board of supervisors of a county to build a jail for the use of the county, and the board are proceeding in good faith in the discharge of that duty, they will not be enjoined at the suit of a taxpayer when it is not alleged that they are acting in excess of their powers, and when no fraud or unfair dealing is shown. In such a case equity is averse to interfering by injunction, since the judicial authority has no power to inter-

<sup>31</sup> *Kelsey v. King*, 32 Barb., 410; *People v. Mayor*, *Ib.*, 102; *People v. Lowber*, 7 Ab. Pr., 158; *Ely v. City of Rochester*, 26 Barb., 133; *Swett v. City of Troy*, 62 Barb., 630; S. C., 12 Ab. Pr. N. S., 100; *Phelps v. City of Watertown*, 61 Barb., 121; *McKinley v. Chosen Freeholders*, 29 N. J. Eq. (2 Stew.), 164; *Lane v. Morrill*, 51 N. H., 422; *Andrews v. Knox Co.*, 70 Ill., 65; *Fitzgerald v. Harms*, 92 Ill., 372; *City of Mt. Carmel v. Shaw*, 155 Ill., 37, 39 N. E., 584, 27 L. R. A., 580, 46 Am. St. Rep., 311; *Johnson v. Sanitary District*, 163 Ill., 285, 45 N. E., 213; *Walker v. Morgan Park*, 175 Ill., 570, 51 N. E., 636; *Canal Commissioners v. Village of East Peoria*, 179 Ill., 214, 53 N. E., 633; *School Trustees v. School Directors*, 190 Ill., 390, 60 N. E., 531; *Wiley v. Board of Commissioners*, 51 Md., 401; *Featherston v. Small*, 77 Ind., 143; *Marshall v. Gill*, 77 Ind., 402; *Argo v. Barthand*, 80 Ind., 63; *Muhler v. Hedekin*, 119 Ind., 481, 20 N. E., 700; *Seward v. Town of Liberty*, 142 Ind., 551, 42 N. E., 39; *Downing v. Ross*, 3 App. D. C., 251; *Board of Education v. Booth*, 110 Ky., 807, 62 S. W., 872, 53 L. R. A., 787; *Roth v. Marshall*, 158 Pa. St., 272, 27 Atl., 945; *State v. Milligan*, 3 Wash., 144, 28 Pac., 369; *Board of Education v. Holt*, 51 West Va., 435, 41 S. E., 337; *Avery v. Job*, 25 Ore., 512, 36 Pac., 293; *Union Steam-Boat Co. v. City of Chicago*, 39 Fed., 723. See also *Mayor v. Weatherby*, 52 Md., 442; *Kelly v. Mayor*, 53 Md., 134; *Mayor v. Eldridge*, 64 Ga., 524.

<sup>32</sup> *People v. Mayor*, 32 Barb., 102.

fere with other departments of the government while acting within the scope of their lawful authority.<sup>33</sup> Nor will the discretion of the common council of a city in matters pertaining to their legislative functions be controlled by the writ of injunction. Hence the action of such a body in authorizing a purchase of lands, if within the powers conferred upon them by their charter, will not be enjoined because improvident, or because of the payment of an exorbitant price, in the absence of any allegations of fraud.<sup>34</sup> So a court of equity will not interfere by injunction with the exercise of the judgment and discretion of a board of municipal officers such as a city council, in the selection of rooms for the use of the city officers, and in issuing city scrip in advance for the payment of rent for such rooms.<sup>35</sup> So the writ will not be granted to restrain city authorities from acting under an ordinance for local improvements, enacted in conformity to law, upon the ground that the improvements are useless and unnecessary.<sup>36</sup> So the action of school authorities in expelling a pupil from the school will not be reviewed in equity and a mandatory injunction will therefore not lie to compel them to reinstate plaintiff after being expelled.<sup>37</sup> Nor will equity interfere by injunction with the directors of a school district in the exercise of their discretion in changing the location of a school house.<sup>38</sup> So the decision by a county superintendent of schools in favor of forming a new school district will not be interfered with by injunction upon the ground that such district is unnecessary.<sup>39</sup> And where municipal officers are proceeding in the exercise of an unquestioned authority with the construction of a work of public convenience, they will not be

<sup>33</sup> *Andrews v. Knox Co.*, 70 Ill., 65.

<sup>34</sup> *People v. Lowber*, 7 Ab. Pr., 158.

<sup>35</sup> *Moses v. Risdon*, 46 Iowa, 251.

<sup>36</sup> *Walker v. Morgan Park*, 175 Ill., 570, 51 N. E., 636.

<sup>37</sup> *Board of Education v. Booth*, 110 Ky., 807, 62 S. W., 872, 53 L. R. A., 787.

<sup>38</sup> *Roth v. Marshall*, 158 Pa. St., 272, 27 Atl., 945.

<sup>39</sup> *School Trustees v. School Directors*, 190 Ill., 390, 60 N. E., 531.

enjoined at the suit of a citizen seeking to restrain the work upon the particular plan proposed, upon the ground that another and different plan is superior. Thus, the owners of mills and mill privileges upon a river in an incorporated city will not be permitted to enjoin the city authorities from improving or reconstructing a public bridge in accordance with a proposed plan, upon the ground that the plan adopted will cause more injury to complainant's mills than would otherwise accrue; since the power to make the improvement necessarily implies the right to determine upon the plan and method of doing it.<sup>40</sup> And where, by the provisions of its charter, general authority is conferred upon a city to establish and regulate markets and market places, the corporate officers will not, in the absence of any threatened abuse of corporate authority, be enjoined from removing a market house, and taxpayers, as such, have no sufficient ground for preventing the removal by injunction, whatever rights adjacent proprietors and others injuriously affected may have.<sup>41</sup>

§ 1241. **Distinction between acts within corporate powers and acts *ultra vires*.** But the restrictions thus placed upon equitable interference with the action of municipal corporations do not extend to cases where the act sought to be enjoined is in excess of the corporate power, but are limited to cases of a conceded jurisdiction, within the bounds of which the municipal power is acting. And while, as is thus shown, equity will not enjoin the action of municipal corporations while proceeding within the limits of their well defined powers as fixed by law, it has undoubted jurisdiction to restrain them from acting in excess of their authority and from the commission of acts which are *ultra vires*.<sup>42</sup> In illustration of this

<sup>40</sup> Ely v. City of Rochester, 26 Barb., 133; Swett v. City of Troy, 62 Barb., 630; S. C., 12 Ab. Pr. N. S., 100.

<sup>41</sup> Gall v. Cincinnati, 18 Ohio St., 563.

<sup>42</sup> Frewin v. Lewis, 4 Myl. & Cr., 249; Attorney-General v. Aspinall, 2 Myl. & Cr., 613; Lord Auckland v. Westminster Local Board of Works, L. R. 7 Ch., 597; Attorney-General v. Mayor, 1 Gif., 363; Lay-



doctrine, where by act of parliament certain lands are directed to be put and kept in proper condition for purposes of public recreation, the municipal authorities having them in charge may be perpetually enjoined from devoting the lands to another and different purpose foreign to that contemplated, as the holding of a cattle fair, such act being entirely beyond the powers conferred upon them by law.<sup>43</sup> And where a municipal body, such as a board of works, entrusted with certain powers for the attainment of certain results, are proceeding in excess of their powers to pull down complainant's buildings, they may be restrained by injunction, their action being *ultra vires*.<sup>44</sup>

§ 1242. **Remedy at law; revocation of license; license on occupations.** The fundamental doctrine which has been so frequently stated and illustrated in the preceding chapters, denying relief by injunction in cases where adequate relief may be had at law, is equally applicable to that branch of the jurisdiction under discussion, and courts of equity will not restrain the action of municipal officers when the persons aggrieved by such action have a full and complete remedy at law.<sup>45</sup> In conformity with this general principle, a board

ton *v. Mayor*, 50 La. An., 121, 23. So., 99.

<sup>43</sup> *Attorney-General v. Mayor*, 1 Gif., 363.

<sup>44</sup> *Lord Auckland v. Westminster Local Board of Works*, L. R. 7 Ch., 597.

<sup>45</sup> *Gaertner v. City of Fond du Lac*, 34 Wis., 497; *Thomas v. Supervisors*, 56 Ill., 351; *Wood v. Bangs*, 1 Dakota, 179; *Kelsey v. King*, 32 Barb., 410. In *Picotte v. Watt*, 3 Idaho, 447, 31 Pac., 805, it was held, in accordance with the general rule as announced in the text, that an injunction would not lie to restrain the payment of an illegal and fraudulent county war-

rant where the aggrieved taxpayer had a positive, statutory remedy by appeal from the action of the county board authorizing the issuing of the warrant. And in *Morgan v. County Commissioners*, 4 Idaho, 418, 39 Pac., 1118, the rule was again applied and it was held that a taxpayer could not enjoin the county board from issuing certain county bonds upon the ground that the question had never been submitted to the electors, since, in such case also, the existence of the statutory remedy of appeal from the action of the board deprived plaintiff of the right to resort to equity. These

of county supervisors will not be enjoined from dismissing an employee, who is acting under a contract with such board, since if the contract be valid the remedy at law is ample and complete, and equity, therefore, has no jurisdiction.<sup>46</sup> So the action of a board of county commissioners in regard to the building of a court house will not be enjoined when a plain and adequate remedy is provided by law for all persons aggrieved by the action of such commissioners.<sup>47</sup> And a court of equity will not grant an injunction against municipal officers whose threatened acts may be corrected by *certiorari* in a court of law.<sup>48</sup> So the fact that the common council of a city have revoked plaintiff's license to sell liquors, without cause and without notice to him or opportunity to be heard, and that he is threatened with arrest and the consequent destruction of his business, will not warrant relief in equity by injunction, and plaintiff will be remitted to his legal remedy.<sup>49</sup> But a city may enjoin persons from transacting business until they have paid a license tax imposed upon occupations;<sup>50</sup> and such

two decisions, correct as they undoubtedly are both upon principle and authority, have in effect been overruled by the later case of *Dunbar v. County Commissioners*, 5 Idaho, 407, 49 Pac., 409, where it was held, notwithstanding the statutory remedy of appeal, that a taxpayer could enjoin the county commissioners from issuing illegal county bonds. In the course of the opinion in this case the court remark that the *Picotte* case, *supra*, has no application, but it is difficult to reconcile the decisions and the *Dunbar* case in effect overrules the earlier ones.

<sup>46</sup> *Thomas v. Supervisors*, 56 Ill., 351.

<sup>47</sup> *Wood v. Bangs*, 1 Dakota, 179.

<sup>48</sup> *Gaertner v. City of Fond du Lac*, 34 Wis., 497; *Kelsey v. King*, 32 Barb., 410.

<sup>49</sup> *Gaertner v. City of Fond du Lac*, 34 Wis., 497. See *McLellan v. Mayor*, 99 Wis., 544, 75 N. W., 308.

<sup>50</sup> *City of New Orleans v. Becker*, 31 La. An., 644; *Wells v. City of New Orleans*, 32 La. An., 676. And the relief was granted in the latter case, notwithstanding the city had been enjoined by the defendant, a saloon keeper, from interfering with his business and collecting such license, the injunction having only the effect of preventing the city from interfering by extra-judicial proceedings.

persons are not entitled to enjoin the city from collecting the license.<sup>51</sup>

§ 1243. **Municipal legislation not enjoined, but illegal acts thereunder may be; illustrations; acts done in governmental as distinguished from proprietary capacity.** The question of equitable interference by injunction with the legislative action of municipal bodies has given rise to some apparent conflict of authority and is not wholly free from doubt. It is believed, however, that the authorities bearing upon this subject may be reconciled by the application of certain fundamental distinctions which lie at the foundation of the jurisdiction of equity over the action of municipal bodies. In the first place, it is unquestionably true that purely legislative acts, such as the passage of resolutions, or the adoption of ordinances by a municipal body, even though alleged to be unconstitutional and void, will not be enjoined, since it is not the province of a court of equity to interfere with the proceedings of municipal bodies in matters resting within their jurisdiction, or to control in any manner the exercise of their discretion. A distinction, however, is properly drawn between the case of restraining an illegal act attempted under the authority and sanction of a municipal body, and restraining the corporation itself from granting such authority. And while courts of equity will not enjoin municipal bodies from the passage of ordinances or resolutions, yet after the passage of such ordinances or resolutions the courts may and will, on a proper case being shown, prevent their enforcement, and for this purpose may enjoin proceedings thereunder which would otherwise result in irreparable injury.<sup>52</sup> And when the property or money of the cor-

<sup>51</sup> *City of New Orleans v. Becker*, 31 La. An., 644.

<sup>52</sup> *Whitney v. Mayor*, 28 Barb., 233; *People v. Mayor*, 32 Barb., 35; *S. C.*, 9 Ab. Pr., 253; *People v. Lowber*, 7 Ab. Pr., 158; *People v. Mayor*, 10 Ab. Pr., 144; *City of*

*Cleveland v. Cleveland City R. Co.*, 194 U. S., 517, 531, 24 Sup. Ct. Rep., 756, 761; *Carter v. City of Chicago*, 57 Ill., 283; *Cicero Lumber Co. v. Cicero*, 176 Ill., 9, 51 N. E., 758, 42 L. R. A., 696, 68 Am. St. Rep., 155; *Albright v. Fisher*,

poration is endangered by illegal proceedings of municipal officers, acting under a city ordinance which is repugnant to the charter and, therefore, inoperative and void, relief by injunction may be allowed.<sup>53</sup> So the enforcement of a city ordinance which is found to be unconstitutional and void, whereby a debt is sought to be imposed upon a city, affords sufficient ground for an injunction in behalf of taxpayers.<sup>54</sup> So a court of equity may enjoin the enforcement of an invalid city ordinance which attempts to reduce the rates of fares charged by a street railway company.<sup>55</sup> But to warrant the relief in any case it must appear that the acts complained of are of such a character that full and adequate redress can not be had at law.<sup>56</sup> And equity will not interfere to prevent the enforcement of a city ordinance simply on the ground of its illegality, nor will it assume jurisdiction to question the lawful election of officers, or the validity of the ordinance *per se*, for the purpose of protecting citizens from an uncertain and remote injury.<sup>57</sup> And since a court of chancery has no juris-

164 Mo., 56, 64 S. W., 106; *Mayor v. Gill*, 31 Md., 375; *Cincinnati S. R. Co. v. Smith*, 29 Ohio St., 291; *Mitchell v. Wiles*, 59 Ind., 364; *Alpers v. San Francisco*, 12 Sawy., 631; *Harrison v. City of New Orleans*, 33 La. An., 222; *Spring Valley Water Works v. Bartlett*, 8 Sawy., 555; S. C., 16 Fed., 615; *Lewis v. Denver C. W. W. Co.*, 19 Col., 236, 34 Pac., 993, 41 Am. St. Rep., 248; *State v. Superior Court*, 105 Wis., 651, 81 N. W., 1046, 48 L. R. A., 819. See *Meredith v. Sayre*, 32 N. J. Eq., 557; *Murphy v. East Portland*, 42 Fed., 308.

<sup>53</sup> *Mitchell v. Wiles*, 59 Ind., 364.

<sup>54</sup> *Mayor v. Gill*, 31 Md., 375.

<sup>55</sup> *City of Cleveland v. Cleveland City R. Co.*, 194 U. S., 517, 531, 24 Sup. Ct. Rep., 756, 761.

<sup>56</sup> *Gartside v. East St. Louis*, 43 Ill., 47; *Cicero Lumber Co. v. Cicero*, 176 Ill., 9, 51 N. E., 758, 42 L. R. A., 696, 68 Am. St. Rep., 155. And see *Doan v. Board of Commissioners*, 3 Idaho, 38, 26 Pac., 167.

<sup>57</sup> *Kearney v. Andrews*, 2 Stockt., 70. This was a bill to restrain the enforcement of certain ordinances for altering the grade of streets, on the ground of their illegality. Williamson, Chancellor, says: "These complainants claim the protection of the court because 'they are holders of real estate in said city, and the situation and value of the property of each of them is directly involved in the said proceeding going on and threatened; and because, in most cases,

diction over matters of a political character, and can not determine controversies concerning the title to public offices, it will not enjoin a board of municipal officers from the enforcement of an ordinance properly falling within their legislative functions, upon the ground that its enforcement would deprive complainants of their right to exercise the functions of certain public offices which they hold.<sup>58</sup> But where relief is sought to restrain the passage of a city ordinance, a distinction has been drawn between a case where the municipality is acting in its purely public or governmental character and one where it is proceeding in its private or proprietary capacity as the owner of property; and in the latter case it has been held that a taxpayer and property owner may enjoin the mayor and members of the city council from passing an ordinance under which the municipal authorities are about to make an illegal and unauthorized disposition of the property of the municipality.<sup>59</sup>

§ 1244. **Suits, arrests or fines for violation of ordinances not enjoined; exceptions.** It necessarily follows from the

the proceedings going on are really useless, and will tend to depreciate their property in value.' If the court can interfere on these grounds, then the owner of land within the jurisdiction of a municipal corporation may question, in this court, the validity of any ordinance of the corporate authorities respecting any real estate within its limits, because the value of his property may be affected by it. This would be assuming a jurisdiction to try the lawful election of officers and the validity of ordinances of corporate bodies upon too slight grounds. How are 'the situation and value of the property of each of these complainants directly involved in these proceed-

ings?' The mere allegation, amounting to a speculative opinion only of these complainants, is not sufficient for the court to act upon. The injury must be specified, and so pointed out that the court can see it must be an inevitable consequence of the act threatened and complained of." But see *Wood v. Brooklyn*, 14 Barb., 425, where it is held that the enforcement by a municipal corporation of an ordinance which is in violation of the laws of the state, and therefore void, may be enjoined.

<sup>58</sup> *Sheridan v. Colvin*, 78 Ill., 237.

<sup>59</sup> *Roberts v. City of Louisville*, 92 Ky., 95, 17 S. W., 216, 13 L. R. A., 844.

doctrines as above stated and illustrated that when municipal ordinances have been enacted by the proper authority, proceedings on the part of municipal officers for their enforcement, as by suits, arrests, or fines, will not be enjoined merely because of the alleged illegality of the ordinances, or for the purpose of awaiting a determination of the question of their validity, when the person aggrieved may have a full and adequate remedy at law,<sup>60</sup> either in the nature of an action for

<sup>60</sup> *West v. Mayor*, 10 Paige, 539; *Cohen v. Commissioners of Goldsboro*, 77 N. C., 2; *Wardens v. Town of Washington*, 109 N. C., 21, 13 S. E., 700; *Scott v. Smith*, 121 N. C., 94, 28 S. E., 64; *Burnett v. Craig*, 30 Ala., 135; *Devron v. First Municipality*, 4 La. An., 11; *Levy v. City of Shreveport*, 27 La. An., 620; *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S., 207, 23 Sup. Ct. Rep. 498; *Paulk v. Mayor*, 104 Ga., 24, 30 S. E., 417, 41 L. R. A., 772, 69 Am. St. Rep., 128; *Mayor v. Patterson*, 109 Ga., 370, 34 S. E., 600; *City of Bainbridge v. Reynolds*, 111 Ga., 758, 36 S. E., 935; *Chicago, B. & Q. R. Co. v. Ottawa*, 148 Ill., 397, 36 N. E., 85; *City of Denver v. Beede*, 25 Col., 172, 54 Pac., 624; *Olympic Athletic Club v. Speer*, 29 Col., 158, 67 Pac., 161; *Ewing v. City of Webster*, 103 Iowa, 226, 72 N. W., 511; *Golden v. City of Guthrie*, 3 Okla., 128, 41 Pac., 350. See also *Gartside v. East St. Louis*, 43 Ill., 47; *Davis v. American Society*, 6 Daly, 81; *Garrison v. City of Atlanta*, 68 Ga., 64; *Poyer v. Village of Des Plaines*, 123 Ill., 111, 13 N. E., 819; *Ludlow & C. C. Co. v. City of Ludlow*, 102 Ky., 354, 43 S. W., 435. *West v. Mayor*, 10 Paige, 539, is a leading case upon the subject under dis-

cussion. It was an application by defendants for the dissolution of an injunction restraining them from prosecuting suits against complainants, their agents or servants, for breaches of city ordinances relative to the weighing of coal. Walworth, Chancellor, observes: "The question as to the validity of the corporation ordinances does not properly belong to this court for decision, where the complainants, as in this case, have a perfect defense at law if the ordinances are invalid, or if they do not render the complainants or those in their employ liable for the penalty. And it would be a usurpation of jurisdiction by this court if it should draw to itself the settlement of such questions when their decision was not necessary in the discharge of the legitimate duties of the court. In the case of *Oakley v. The Mayor*, etc., of New York, decided in April, 1840, which was a bill for an injunction to restrain the prosecution of suits at law under the market ordinances, I decided that if the objections to the legality of those ordinances were well taken the complainant had a perfect defense at law, and that this court would not grant an injunction to

damages or by pleading the invalidity of the ordinance as a defense to prosecution under it. A court of equity will not, therefore, interfere by injunction to restrain municipal officers from prosecuting suits against complainants, or from interfering with their business because of their violation of municipal ordinances which are alleged to be illegal, since the question of the validity of such ordinances does not properly pertain to a court of equity when complainants have a perfect remedy at law, if the ordinances are invalid, by an action to recover damages for the injury sustained.<sup>61</sup> So municipal officers will not be enjoined from collecting fines imposed upon complainant for the violation of a municipal ordinance until the validity of the ordinance shall have been determined by proceedings at law in the nature of a *quo warranto* instituted by complainant, since an injunction will not lie to prevent a

protect him against a multiplicity of suits, until his right to such protection had been established by a successful defense at law in some of the suits. See *Eldridge v. Hill*, 2 John. Ch. Rep., 281. In the present case the complainants' bill does not show that they have established their right at law; but, on the contrary, it is distinctly stated in the bill that in some of the suits which have been commenced the decision has been adverse to the complainants, and that the other suits have not yet been decided. It is true they complain that in this case the court decided the law against them, but did not submit the legality of the ordinances to the jury to be decided as a matter of fact, and that they intend to carry the question as to such legality before a higher tribunal for a decision. But neither of these circumstances can give

jurisdiction to this court to interfere before the right of complainants is established by such higher tribunal. And if they are successful there, it is not probable that the interference of this court will be necessary." In *Sylvester Coal Co. v. City of St. Louis*, 130 Mo., 323, 32 S. W., 649, 51 Am. St. Rep., 566, the court attempt to justify equitable jurisdiction because of the inadequacy of the legal remedy and to prevent plaintiffs from being subjected to a multiplicity of suits, although there is nothing to show that the municipal authorities were about to harass plaintiffs with continuous and repeated prosecutions.

<sup>61</sup> *West v. Mayor*, 10 Paige, 539; *Cohen v. Commissioners of Goldsboro*, 77 N. C., 2; *Scott v. Smith*, 121 N. C., 94, 28 S. E., 64.

prosecution either of a criminal or a *quasi* criminal nature. And if, in such case, defendants are proceeding without authority of law to impose fines and imprisonment, they are mere trespassers, and the remedy should be sought at law.<sup>62</sup> Nor will an action for an injunction be entertained to test the authority of the mayor of a city to arrest and fine complainants for carrying on a business in contravention of the city ordinances, and to test the legality of such ordinances, the proper remedy being by appeal from the judgments imposing the penalties prescribed by the ordinances.<sup>63</sup> So equity will not enjoin prosecutions under municipal ordinances upon the ground that complainant is not guilty of their violation, since such defense may be raised at law.<sup>64</sup> So municipal authorities will not be enjoined from causing prosecutions and arrests for violation of a city ordinance alleged to violate the federal constitution, where there is no showing that plaintiff is without an adequate remedy at law.<sup>65</sup> And an injunction will not be granted to restrain the prosecution of suits before justices of the peace for violations of city ordinances, when complainant may test the legality and validity of the ordinances by a direct appeal from the decision of the justices.<sup>66</sup> So where a society is duly incorporated for the prevention of cruelty to animals, and its agents are empowered to make arrests within a given city or county for violating an act of legislature making cruelty to animals a misdemeanor, an injunction will not lie to prevent such agents from making arrests for violations of the law. And in such case the relief is properly refused upon the ground that if the act is unconstitutional and confers no power to make the arrest, or if the arrest under the statute is itself unjustifiable

<sup>62</sup> *Burnett v. Craig*, 30 Ala., 135. *Co. v. City of Ludlow*, 102 Ky.,

<sup>63</sup> *Levy v. City of Shreveport*, 27 La. An., 620; *Golden v. City of Guthrie*, 3 Okla., 128, 41 Pac., 350. <sup>65</sup> *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S., 207, 23

<sup>64</sup> *Shoemaker v. Entwisle*, 1 App. D. C., 252; *Ludlow & C. Co.* <sup>66</sup> *Sup. Ct. Rep.*, 498.

<sup>66</sup> *Devron v. First Municipality*, 4 La. An., 11.



or unlawful, the remedy at law by an action for damages is the appropriate means of relief, and there is, therefore, no ground for the interference of equity by injunction.<sup>67</sup> But an injunction has been held to be the appropriate remedy to prevent a city from repeatedly prosecuting a citizen for violating a city ordinance prohibiting any person from holding possession of any streets or commons of the city, when plaintiff asserts title to the premises in controversy, the relief being allowed until the disputed question of title can be determined.<sup>68</sup> And where an illegal ordinance has been enacted imposing penalties for its violation, although plaintiff would have an adequate remedy at law by pleading such invalidity as a defense to prosecutions under the ordinance if prosecutions were begun, yet where the authorities are failing or refusing to institute such proceedings, and irreparable injury is being inflicted upon plaintiff as the result of the existence of the ordinance and of the refusal of the public to deal with him owing to the fear of its enforcement, a proper case is presented for an injunction against the enforcement of the ordinance, the relief being granted because of the want of any other means of redress for the wrong thus inflicted.<sup>69</sup> And where plaintiff, a corporation, has refused to comply with the terms of an ordinance, certain provisions of which are void as to it, equity will enjoin prosecutions brought against plaintiff's employees for the purpose of compelling plaintiff to comply with the terms of the ordinance.<sup>70</sup>

§ 1245. **Ordinance for landing of boats at wharf.** It is also held that where the municipal authorities of a town have authorized certain persons to erect and maintain a wharf for the landing of vessels, such persons are not entitled to an injunction to restrain the municipal officers from enforcing a

<sup>67</sup> *Davis v. American Society, 6 Cemetery Association*, 87 Tex., 330, 28 S. W., 528, 47 Am. St. Rep., 114, Daly, 81.

<sup>68</sup> *Shinkle v. City of Covington*, 70 *City of Rushville v. Rushville*, 83 Ky., 420, N. G. Co., 132 Ind., 575, 28 N. E.,

<sup>69</sup> *City of Austin v. Austin City* 853, 15 L. R. A., 321.

subsequent ordinance requiring all boats arriving in port to land at a public landing kept by the town unless permission be obtained to land elsewhere. And equitable relief is properly refused in such case upon the ground that such an exercise of authority upon the part of the municipality is not subject to revision or control by the writ of injunction.<sup>71</sup>

§ 1246. **Passage of ordinance concerning municipal improvements not enjoined.** A court of equity will not interfere by injunction with the exercise of the legislative power vested by law in inferior municipal bodies, such as the authority of the common council of a city over public improvements in the city. It will not, therefore, enjoin such council from the passage of an ordinance seeking to repeal a prior ordinance authorizing the erection of gas works and their operation by plaintiffs for a given term of years, since this would be an interference by the judicial with the legislative power of the government, the act of the council in such case being legislative in its nature. And the fact that the ordinance which it is sought to repeal is claimed to be a contract giving an exclusive franchise to plaintiffs does not warrant an injunction in such case against the legislative act of the council.<sup>72</sup> And upon the same principle, a court of equity will not enjoin a city council from passing an ordinance granting the privilege of laying gas pipes in the streets of the city and providing for the execution of contracts with others for that purpose, although such action is claimed to be in violation of plaintiff's exclusive right to lay pipes in such streets under a prior ordinance from the city.<sup>73</sup> So equity will not enjoin a city council from the passage of an ordinance vacating certain streets in the city, there being ample remedy at law by *certiorari*.<sup>74</sup>

<sup>71</sup> *Brown v. Trustees of Catlettsburg*, 11 Bush, 435.

<sup>72</sup> *Des Moines Gas Co. v. City of Des Moines*, 44 Iowa, 505.

<sup>73</sup> *Montgomery G.-L. Co. v. City Council of Montgomery*, 87 Ala., 245, 6 So., 113, 4 L. R. A., 616.

<sup>74</sup> *Stubenrauch v. Neyenesch*, 54 Iowa, 567, 7 N. W., 1.

§ 1247. **Proceedings under ordinance in excess of power enjoined.** In determining the right to preventive relief against the enforcement of municipal ordinances, a distinction has been drawn between cases where the municipal authorities are acting within the limits of the powers conferred upon them by law, and cases where they are guilty of a plain departure from such powers. And while, in the former class of cases, equity will not interfere with the exercise of a public or political power vested in the officers of a city government, in the latter class relief may be allowed. And where the authorities of a city, acting from fraudulent and malicious motives, attempt to enforce a city ordinance whereby it is sought to appropriate to the public use for a street so much of one side of the street as will deprive the adjacent owners of any sidewalk, an injunction may properly be allowed.<sup>75</sup> So it has been held that the common council of a city may be enjoined from enforcing an illegal ordinance or order for the vacation of a street, which has been made without the necessary consent of the requisite number of property holders.<sup>76</sup> And it is held that proceedings by a municipal corporation under an ordinance which is entirely void may be restrained.<sup>77</sup>

§ 1248. **Ordinances concerning nuisances.** Equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation restraining a certain act, unless the act is shown to be a nuisance *per se*.<sup>78</sup> And where a body

<sup>75</sup> *Carter v. City of Chicago*, 57 Ill., 283. In *Wong Wai v. Williamson*, 103 Fed., 1, it was held that a court of equity would enjoin the enforcement of a resolution adopted by a board of health where the resolution, being directed without just cause or reason against persons of a certain class, was so unreasonable as to be illegal and void.

<sup>76</sup> *Spiegel v. Gansberg*, 44 Ind., 418.

<sup>77</sup> *Mayor v. Radecke*, 49 Md., 217.

<sup>78</sup> *Mayor v. Thorne*, 7 Paige, 261; *Village of St. Johns v. McFarlan*, 33 Mich., 72. In *Mayor v. Thorne*, an injunction was dissolved which had been granted at the instance of a city against certain parties for violation of an ordinance prohibiting the manufacture of pressed hay. But see *First National Bank v. Sarlls*, 129 Ind., 201, 28 N. E., 434, 13 L. R. A., 481, 28 Am. St. Rep., 185.

of commissioners, as a board of health, appointed by the executive power of the state, and having no authority for exercising the powers of local legislation, attempt by an ordinance to abate as a nuisance that which is not a nuisance at common law, their proceedings may be enjoined.<sup>79</sup>

§ 1249. **Invalidity of municipal organization.** Courts of equity have no jurisdiction, independent of statute, to enjoin at the suit of citizens the proceedings of county officers because of the illegality of the act creating such county, when no question of private right is involved, since the state itself is the only party to institute proceedings to test the franchise of a municipality, the appropriate remedy for that purpose being by proceedings in *quo warranto*. And where a court of equity powers has nevertheless entertained jurisdiction and enjoined county officers from exercising their functions upon the ground of the invalidity of the law creating the county, it may be prevented by the writ of prohibition from proceeding with the cause.<sup>80</sup> Nor is an injunction the appropriate remedy to test the legality of the organization of a municipality, or to prevent its officers from acting upon the ground that it is not properly organized, and the parties aggrieved will be left to their remedy at law by proceedings in *quo warranto*.<sup>81</sup>

§ 1250. **Injunction not granted against municipal election; distinction between election for office and election to vote on annexation of territory.** A court of equity has no jurisdiction to interfere in disputes concerning municipal elections, and when a court has assumed jurisdiction in such a case and

<sup>79</sup> *Schuster v. Metropolitan Board of Health*, 49 Barb., 450.

<sup>80</sup> *Henry v. Steele*, 28 Ark., 455. But in Pennsylvania it has been held that where two different bodies were attempting, under claim of right to act as the common council of a city, a preliminary injunction might be granted, upon the ground that the acts in ques-

tion were contrary to law and prejudicial to the interests of the community, and because no adequate remedy could be had at law. *Kerr v. Trego*, 47 Pa. St., 292.

<sup>81</sup> *MacDonald v. Rehner*, 22 Fla., 198; *Bateman v. Florida C. Co.*, 26 Fla., 423, 8 So., 51.

has enjoined a board of municipal officers, such as the common council of a city, from canvassing the returns of a municipal election, which is made their duty by law, such injunction will be regarded as absolutely void for want of jurisdiction over the subject-matter.<sup>82</sup> So equity will not enjoin public officers from placing upon the ballots to be used at an election the question of the re-location of the county seat.<sup>83</sup> Nor will a court of equity restrain municipal officers from holding an election merely because of the disorder and confusion which it is feared would result from two contending bodies claiming to be entitled to the government of a city, the appropriate remedy in such case being by proceedings in *quo warranto*.<sup>84</sup> But a distinction has been made between an election in which a public office is involved, the right to hold which may thus be tested by *quo warranto*, and one called for the purpose of determining the question whether certain territory shall be annexed to a municipality; and in the latter case it has been held that the owner of property in the territory proposed to be annexed may enjoin the holding of such an election where the ordinance under which it is called is illegal and void.<sup>85</sup>

§ 1251. **Letting contracts to lowest bidder; lowest responsible bidder; failure to submit plans and specifications; free competition among bidders; laches no bar.** It not infre-

<sup>82</sup> Dickey v. Reed, 78 Ill., 261. See also Bynum v. Commissioners of Burke Co., 101 N. C., 412, 8 S. E., 136; Wilber v. Wooley, 44 Neb., 739, 62 N. W., 1095.

<sup>83</sup> Morgan v. County Court, 53 West Va., 372, 44 S. E., 182.

<sup>84</sup> Holmes v. Oldham, 1 Hughes, 76.

<sup>85</sup> Mayor v. Hughes, 110 Ga., 795, 36 S. E., 247; Layton v. Mayor, 50 La. An., 121, 23 So., 99. And in Murfreesboro R. Co. v. Board of Commissioners, 108 N. C., 56, 12

S. E., 952, it was held that where it is apparent that an election called for the purpose of voting upon the question as to the use to be made of certain railway aid bonds, although it may be lawfully held, will result in no possible benefit to the persons at whose request it is called, while it may result in irreparable injury to the plaintiff, a preliminary injunction should be allowed restraining the municipal authorities from calling such election.

quently happens that municipal officers who are empowered by law to construct works of public improvement, such as public buildings, roads and bridges, are restricted by the terms of their charter, or by other controlling legislation, to the letting of contracts for such works to the lowest bidder, after due advertisement as required by law. And the rule may be regarded as well settled that in all cases where the power to let such contracts is dependent upon conditions and restrictions of this nature, a disregard of, or failure to comply with the necessary conditions constitutes sufficient ground for relief by injunction against the construction of the proposed improvement, or awarding a contract therefor. In such cases, a distinction is properly drawn between the exercise of an unquestioned power over the subject-matter, within whose limits the discretion of municipal bodies will not be interfered with, and an absence or excess of power rendering the action of the municipality void.<sup>86</sup> Where, therefore, municipal officers are required by law to let contracts for the construction of public works or other public contracts to the lowest bidder, they may be enjoined at the suit of a property owner and taxpayer from awarding such contracts in violation of the restriction thus imposed upon them.<sup>87</sup> But a distinction has been made between cases where the statute requires that the contract shall be awarded to the lowest bidder merely and those where the law provides that it shall be given to the lowest responsible or competent bidder. And in the latter case it is held that the

<sup>86</sup> *Schumm v. Seymour*, 9 C. E. Green, 143; *Commissioners of Benton Co. v. Templeton*, 51 Ind., 266; *Follmer v. Nuckolls Co.*, 6 Neb., 204. And in *Commissioners of Benton Co. v. Templeton*, 51 Ind., 266, the court, Biddle, C. J., say, p. 269: "While it is quite true that the administrative discretion of the board in the business affairs of the county can not be reviewed by a court, yet when

the board undertake to do an act unauthorized by law, a court will enjoin them, and this is the proper remedy. Boards have an administrative discretion within the law, but none without or against it."

<sup>87</sup> *Mueller v. Eau Claire County*, 108 Wis., 304, 84 N. W., 430; *Times Publishing Co. v. Everett*, 9 Wash., 518, 37 Pac., 695, 43 Am. St. Rep., 865.

presence of the element of responsibility changes the character of the duty imposed upon the municipal authorities from a purely ministerial one to one which involves the exercise of their judgment and discretion, and in such cases the courts accordingly decline to interfere with such officials in the performance of the duties thus imposed upon them.<sup>88</sup> And where there is no requirement at all that contracts for public work shall be let to the lowest responsible bidder, equity will not restrain the letting of a public contract on the ground that lower bids have been received, since in such case the awarding of the contract is a matter which lies within the judgment and discretion of the public officer.<sup>89</sup> But where the charter of a municipal corporation prohibits the making of contracts for works of public improvement, except after public advertisement of the specifications and proposals for the work in question, a disregard of this requirement of the charter in awarding a contract for such work affords sufficient ground for an injunction at the suit of taxpayers, since in such case the municipal authorities are proceeding in excess of their powers, and their contract is, therefore, utterly void.<sup>90</sup> So equity will enjoin the awarding of a public contract where the authorities, in advertising for bids, have failed to submit definite plans and specifications.<sup>91</sup> And where, after advertising for proposals for the construction of a public work, the municipal officers make material alterations in the plans and specifications and thereupon enter into a new contract for the work without a new advertisement, the carrying out of such con-

<sup>88</sup> *Johnson v. Sanitary District*, 163 Ill., 285, 45 N. E., 213; *Muel-ler v. Eau Claire County*, 108 Wis., 304, 84 N. W., 430. In *Follmer v. Nuckolls Co.*, 6 Neb., 204, the relief was granted although the statute provided that the contract should be let to the lowest competent bidder. The distinction in question seems not to have been

referred to. See *Crabtree v. Gobson*, 78 Ga., 230, 3 S. E., 10.

<sup>89</sup> *Board of Commissioners v. State*, 47 Kan., 283, 27 Pac., 997.

<sup>90</sup> *Schumm v. Seymour*, 9 C. E. Green, 143.

<sup>91</sup> *Fones Hardware Co. v. Erb*, 54 Ark., 645, 17 S. W., 7, 13 L. R. A., 353.

tract will be restrained.<sup>92</sup> So equity will enjoin municipal officers from awarding a contract founded upon bids which are based upon plans and specifications prepared by the bidder instead of by the municipal authorities as required by law.<sup>93</sup> So when a board of county commissioners are empowered by law to let contracts for public buildings after advertisement to the lowest bidder only, and only at the time fixed by such advertisement, they may be enjoined from letting such a contract at a subsequent date without a new advertisement.<sup>94</sup> So where public officers are required to let contracts for public work to the lowest responsible bidder, after due notice and advertisement, a failure to make the proper advertisement renders the contract void, and the officials may be restrained from issuing vouchers in payment of money due under the contract.<sup>95</sup> And it may be asserted generally that where the law requires contracts for public improvements to be let to the lowest responsible bidder, any failure to frame the proposals and specifications in such a manner as to permit full and free competition among prospective bidders renders a contract based upon such specifications wholly void and is sufficient to warrant equitable relief upon behalf of taxpayers to restrain the carrying out of such contracts.<sup>96</sup> It is also held in the class of cases under discussion that the inaction and silence of complainants in permitting the work to go on and receiving its benefits will not debar them from the desired relief, the case being one of an illegal assumption of power

<sup>92</sup> *Manly Building Co. v. Newton*, 114 Ga., 245, 40 S. E., 274.

<sup>93</sup> *Packard v. Hayes*, 94 Md., 233, 51 Atl., 32; *Ertle v. Leary*, 114 Cal., 238, 46 Pac., 1.

<sup>94</sup> *Commissioners of Benton Co. v. Templeton*, 51 Ind., 266.

<sup>95</sup> *Littler v. Jayne*, 124 Ill., 123, 16 N. E., 374.

<sup>96</sup> *Diamond v. City of Mankato*, 89 Minn., 48, 93 N. W., 911, 61 L.

R. A., 448; *Schiffman v. City of St. Paul*, 88 Minn., 43, 92 N. W., 503. And in the latter case it was held that there was no merit in the contention that plaintiff, a taxpayer, had an adequate remedy at law by waiting until the void contract was partially or wholly carried out and then objecting to the issuing of orders for the payment of the contract.



upon the part of the corporate authorities, and not a case in which they are the representatives of the property owners, acting within the terms of a delegated power.<sup>97</sup>

§ 1252. **The same; plaintiff must sue as taxpayer and not as lowest bidder.** Where, however, the charter of a city requires contracts for street improvements to be let to the lowest bidder, and the municipal officers advertise for proposals for such work, but only let the contract for a portion of the work specified and for which bids are received, and subsequently contract with the lowest bidder for the residue of the work, equity will not enjoin the collection of an assessment levied for the payment of the work, because no new bids were received for the second contract, but will treat it as a continuation of the original.<sup>98</sup> And when a board of municipal officers are entrusted with unlimited discretion in awarding contracts for public works, and are not required to award them to the lowest bidder, when they have advertised for contracts and have used their best judgment and discretion in the matter, they will not be enjoined by the lowest bidder from contracting with a higher bidder.<sup>99</sup> And where the law requires public contracts to be awarded to the lowest bidder, one who has made a bid for such a contract can not, upon the ground that his bid is the lowest, restrain the municipal authorities from letting the contract to another, where he is asserting merely a private right based upon his bid and is not proceeding as a taxpayer or upon behalf of the public.<sup>1</sup>

§ 1253. **Selection of newspaper for publication of official proceedings.** While, as has already been shown, courts of

<sup>97</sup> Schumm v. Seymour, 9 C. E. Green, 143.

<sup>98</sup> Brevoort v. Detroit, 24 Mich. 322.

<sup>99</sup> Cleveland F. A. T. Co. v. Board of Fire Commissioners, 55 Barb., 288.

<sup>1</sup> Arkansas Democrat Co. v. Press Printing Co., 57 Ark., 322, 21 S. W., 586. And see Times Publishing Co. v. Everett, 9 Wash., 518, 37 Pac., 695, 43 Am. St. Rep., 865.

equity do not interfere with the discretion and judgment of municipal bodies in matters properly resting in their control, yet when a plain and imperative duty is imposed upon them by law, of a purely ministerial nature, such as the selection of a newspaper for publishing a delinquent tax list, a disregard of such duty affords ground for an injunction, in behalf of a taxpayer, to restrain the unauthorized publication of such list.<sup>2</sup> But when a particular newspaper has been designated by the common council of a city for the publication of the official proceedings of the council and city authorities, the publication of such matter being legal and proper in itself, the paper so designated will not be enjoined from such publication by another newspaper claiming to be entitled thereto. And the relief is denied in such case upon the ground that, even if the city authorities are acting in violation of their charter in authorizing such publication in the paper designated, yet that paper, having no privity with complainant, will not be enjoined from the publication at the suit of the latter.<sup>3</sup>

§ 1254. **Annexation of territory to municipality.** The question of the power of equity to prevent by injunction the enlargement of the territorial limits of a municipal corporation by the annexation of adjacent territory would seem to be dependent upon the existence of a power in the municipality to make such enlargement, as well as the proper exercise of such power. And where under the laws of the state a board of county commissioners are authorized upon the application of the common council of a city to annex contiguous territory to the city, such legislation being constitutional and the proceedings being found regular, a court of equity will not enjoin the annexation upon the application of a property holder affected thereby.<sup>4</sup> Where, however, the proceedings of a mu-

<sup>2</sup> *Sinclair v. Commissioners of Winona Co.*, 23 Minn., 404.

<sup>3</sup> *German Printing & Publishing Co. v. Illinois Staats Zeitung Co.*,

55 Ill., 127.

<sup>4</sup> *Stilz v. City of Indianapolis*, 55 Ind., 515. See also *Graham v.*

*City of Greenville*, 67 Tex., 62, 2 S. W., 742.

municipal corporation in the annexation of adjacent territory to the municipality are in excess of the corporate power and authority, they may be enjoined at the suit of a citizen and taxpayer whose taxes would be increased by the proposed action.<sup>5</sup> So property owners in the territory sought to be annexed, suing in behalf of themselves and all others similarly situated, may enjoin such illegal annexation, both upon the ground of preventing illegal taxation and to prevent a change of the property of citizens from the territorial limits of one municipality or political body to those of another.<sup>6</sup> So property owners in the territory proposed to be annexed may enjoin the holding of an election called for the purpose of voting upon the question of the proposed annexation, where the ordinance under which it is being called is illegal and void for non-compliance with certain statutory provisions.<sup>7</sup> So when the proceedings by a board of municipal officers for annexing contiguous territory to a city are wholly void, by reason of non-compliance with the statute conferring their jurisdiction, taxes assessed by the city upon the land thus annexed may be enjoined.<sup>8</sup> And where under the law conferring their authority, such officers have no power to annex a portion of the property, petitioned for, and are only authorized to grant the prayer of the petition as a whole, the annexation of a part will be treated as void, and the collection of taxes levied by the city upon the part so annexed may be enjoined.<sup>9</sup> And since the property of a municipal corporation is held by it in trust for the public, it may maintain a bill to restrain another municipality from interfering with such property and from

<sup>5</sup> *Pittsburg's Appeal*, 79 Pa. St., 317; *City of Delphi v. Startzman*, 104 Ind., 343, 3 N. E., 937.

<sup>6</sup> *City of Delphi v. Startzman*, 104 Ind., 343, 3 N. E., 937.

<sup>7</sup> *Mayor v. Hughes*, 110 Ga., 795, 36 S. E., 247; *Layton v. Mayor*, 50 La. An., 121, 23 So., 99.

<sup>8</sup> *Windman v. City of Vincennes*, 58 Ind., 480. And see *Town of Cicero v. Williamson*, 91 Ind., 541. But see *South Platte L. Co. v. Buffalo Co.*, 15 Neb., 605, 19 N. W., 711.

<sup>9</sup> *City of Peru v. Bearss*, 55 Ind., 576.

exercising jurisdiction within the limits of the plaintiff corporation under proceedings for annexation which are held to be void.<sup>10</sup> But a creditor of a county is not entitled to an injunction to prevent a proposed change in the boundary line of the county, made under an act of legislature which is constitutional, merely because by detaching a part of the county the security for his debt will be altered or impaired.<sup>11</sup>

§ 1255. **Making contract within municipal authority not enjoined.** A municipal corporation will not be enjoined from entering into a contract within the scope of its authority and the purposes for which it was created, in the absence of any legal enactment restricting it from making such contract, and when there is no charge of fraud or improper conduct against the municipal authorities.<sup>12</sup> And since equity has no supervisory power over municipal corporations, or over the acts and proceedings of their officers, it will not interfere by injunction with the action of a municipality in matters of contract when it is not shown that the rights of the citizen seeking the relief have been either injured or menaced in a matter falling under some recognized head of equitable jurisdiction. It will not, therefore, at the suit of a citizen and taxpayer, restrain the authorities of a city from making a contract for street improvements, or from giving drafts in payment for such work, when plaintiff's premises have not been interfered with, and when no assessment has been made or tax levied to meet such payments.<sup>13</sup> Nor can a taxpayer enjoin a city from entering into a contract for lighting the streets while a contract with other parties for the same purpose is in force, when plaintiff fails to show that he will sustain any injury by the proposed action of the city authorities.<sup>14</sup>

<sup>10</sup> *Village of Hyde Park v. City of Chicago*, 124 Ill., 156, 16 N. E., 222. And see *Morris v. Mayor*, 10 C. E. Green, 345.

<sup>11</sup> *Moore v. Ballard*, 69 N. C., 21.

<sup>13</sup> *Phelps v. City of Watertown*, 61 Barb., 121.

<sup>12</sup> *Pullman v. Mayor*, 54 Barb., 169, reversing S. C., 49 Barb., 57.

<sup>14</sup> *Searle v. Abraham*, 73 Iowa, 507.

§ 1255 *a*. **Relief granted where contract illegal; illustrations; plaintiff must be free from fault.** Upon the other hand, where a contract about to be entered into by a municipality is illegal and void as being in contravention of the laws by which it is governed or because beyond the power of the municipal authorities to execute, a taxpayer who will be injured thereby may invoke the aid of equity to restrain the municipal officers from entering into the agreement in question, or, if already consummated, from carrying it into effect.<sup>15</sup> For example, where it is provided by statute that the ordinances of a city shall be published in an English newspaper, an injunction was granted restraining the municipal officers from entering into a contract to make the publication in question in a German newspaper.<sup>16</sup> So equity may enjoin the carrying out of a contract by which the defendant, in consideration of the collection by him of certain outstanding back taxes due the county, was to receive as compensation for his services an agreed percentage of the money thus collected, such an agreement being beyond the power of the county officials to make.<sup>17</sup> So municipal officers may be enjoined at the suit of a

<sup>15</sup> *Cincinnati S. R. Company v. McCall*, 95 Tex., 565, 68 S. W., 791; *Smith*, 29 Ohio St., 291; *City of Chicago v. McCoy*, 136 Ill., 344, 26 N. E., 363, 11 L. R. A., 413; *City of Chicago v. McDonald*, 176 Ill., 404, 52 N. E., 982; *Adams v. Brennan*, 177 Ill., 194, 52 N. E., 314, 42 L. R. A., 718, 69 Am. St. Rep., 222; *Holden v. City of Alton*, 179 Ill., 318, 53 N. E., 556; *City of Chicago v. Galpin*, 183 Ill., 399, 55 N. E., 731; *Inge v. Board of Public Works*, 135 Ala., 187, 33 So., 678; *City of Atlanta v. Stein*, 111 Ga., 789, 36 S. E., 932, 51 L. R. A., 335; *Board of Commissioners v. Gillies*, 138 Ind., 667, 38 N. E., 40; *Peck v. Belknap*, 130 N. Y., 394, 29 N. E., 977; *City of Austin v. Engstad v. Dinnie*, 8 N. Dak., 1, 76 N. W., 292; *Storey v. Murphy*, 9 N. Dak., 115, 81 N. W., 23; *Roberts v. City of Fargo*, 10 N. Dak., 230, 86 N. W., 726; *Burness v. Multnomah County*, 37 Ore., 460, 60 Pac., 1005; *Siegel v. Town of Liberty*, 111 Wis., 470, 87 N. W., 487; *Mayor v. Keyser*, 72 Ind., 106, 19 Atl., 706.

<sup>16</sup> *City of Chicago v. McCoy*, 136 Ill., 344, 26 N. E., 363, 11 L. R. A., 413.

<sup>17</sup> *Burness v. Multnomah County*, 37 Ore., 460, 60 Pac., 1005; *Storey v. Murphy*, 9 N. Dak., 115, 81 N. W., 23.

taxpayer from carrying out a contract which has been awarded contrary to the provisions of the ordinance authorizing them to make the contract in question.<sup>18</sup> So a taxpayer may maintain a bill to restrain the municipal authorities from entering into a contract for the employment of a person to render services to the city upon the ground that the person thus employed has not passed the necessary civil service examination as required by law.<sup>19</sup> So the relief will be granted upon behalf of a taxpayer to restrain the carrying out of a contract creating an indebtedness upon the part of the city, which fails to comply with a provision of the state constitution requiring the creation of a sinking fund for the payment of such an indebtedness.<sup>20</sup> So where the ordinance under which a municipal contract is about to be awarded, or the call for bids upon which such a contract is based, provides that none but union labor shall be employed upon the work in question, such a restriction renders the contract itself illegal and void and a taxpayer may restrain the municipal authorities from making or carrying out such an agreement.<sup>21</sup> So also where it is provided that the work shall not be done by alien or convict labor, the contract is void and its enforcement will be enjoined.<sup>22</sup> But in all such cases, the court will scrutinize the conduct of the complaining taxpayer and if he has aided or encouraged the making of the illegal contract, the relief will be denied. Thus, a taxpayer will not be permitted to enjoin the payment of a warrant issued in payment of work done under an illegal contract made by municipal officers, where he was among those who petitioned for the contract and has

<sup>18</sup> *Mayor v. Keyser*, 72 Md., 106, 19 Atl., 706.

<sup>19</sup> *Peck v. Belknap*, 130 N. Y., 394, 29 N. E., 977.

<sup>20</sup> *City of Austin v. McCall*, 95 Tex., 565, 68 S. W., 791.

<sup>21</sup> *Adams v. Brennan*, 177 Ill., 194, 52 N. E., 314, 42 L. R. A., 718, 69

Am. St. Rep., 222; *Holden v. City of Alton*, 179 Ill., 318, 53 N. E., 556; *City of Atlanta v. Stein*, 111 Ga., 789, 36 S. E., 932, 51 L. R. A., 335.

<sup>22</sup> *Inge v. Board of Public Works*, 135 Ala., 187, 33 So., 678.

stood by without objection and seen the work under the contract carried on to completion.<sup>23</sup>

§ 1256. **Right must be clear; authority or title of officers not determined by injunction.** It may be asserted as a general rule that the questions of right involved must be clearly and definitely settled before equity will interfere with the action of municipal bodies; and where the purpose of an injunction is to restrain certain action of the common council of a city, but the right in issue is so indefinite as to be a perpetual source of dispute, and the rights of the corporation would probably be disastrously affected by the injunction, it will not be granted.<sup>24</sup> So when municipal officers, claiming to act under legal authority, assert the right to perform a particular duty in connection with municipal affairs, the only question presented by the bill seeking to enjoin them being the legal question of their authority, and no irreparable injury is shown to result from their assertion of authority, an injunction will be denied, and the parties aggrieved will be left to determine the question of authority by proceedings in *quo warranto*.<sup>25</sup> So, too, when an injunction is sought to restrain defendants from interfering with the teaching of a public school by a person alleged to have been properly employed for that purpose, but the controversy involves a determination as to who are officers of the district legally authorized and empowered to act, equity will decline to interfere, the question of title to office being properly determinable in a court of law.<sup>26</sup> And when it is sought to enjoin the erection of public buildings by a municipal corporation, but the effect of the injunction would be to arrest a great public work after a large expenditure of money, equity will

<sup>23</sup> *Travis v. Ward*, 2 Wash., 30, 25 Pac., 908.

<sup>24</sup> *Municipality No. 1 v. Municipality No. 2*, 12 La., 49.

<sup>25</sup> *Brown v. Reding*, 50 N. H., 336.

<sup>26</sup> *District Township v. Barrett*, 47 Iowa, 110.

not interfere unless in a clear case of abuse of authority by defendants.<sup>27</sup>

**§ 1257. Removal of county seat; location of county line.**

An injunction is the appropriate remedy to prevent the removal by county officers of their offices and records, pending the determination of a litigation concerning the removal of the county seat, provided such suit is prosecuted with reasonable diligence. And in such case the fact that a majority of the votes cast at an election called to determine the question of such removal were in the negative affords ground for the injunction.<sup>28</sup> So the removal of a county seat will be enjoined when based upon an election which is totally illegal and void because of the insufficiency of the petition by which the question of the removal was submitted to the popular vote.<sup>29</sup> So equity will restrain the removal of the county seat at the suit of a taxpayer where the county commissioners have declared an election in favor of the removal without making a proper canvass of the votes cast upon the question.<sup>30</sup> But a board of county commissioners will not be enjoined from relocating a county seat under legal authority conferred upon them for that purpose, because of frauds alleged to have been practiced upon them in their proceedings, when such grounds could have been urged before final judgment in the proceeding for removal; especially when a long and unreason-

<sup>27</sup> *Wheeler v. Rice*, 83 Pa. St., 232.

<sup>28</sup> *Shaw v. Hill*, 67 Ill., 455. And see *Todd v. Rustad*, 43 Minn., 500, 46 N. E., 73, where the court recognize the rule that a taxpayer may enjoin the removal of the county seat where there is an entire absence of legal authority or where the proceedings threatened are under a statute which is unconstitutional but denied the relief because of the existence of a statutory remedy for contesting the election.

See also *Doan v. Board of Commissioners*, 3 Idaho, 38, 26 Pac., 167, where a taxpayer enjoined the county officials from removing the county records upon the ground that the town to which they were being removed had never been legally determined upon as the county seat.

<sup>29</sup> *Rickey v. Williams*, 8 Wash., 479, 36 Pac., 480.

<sup>30</sup> *Krieschel v. County Commissioners*, 12 Wash., 428, 41 Pac., 186.



able delay has occurred before the application for an injunction.<sup>31</sup> Nor will such removal be enjoined because of irregularities in the election by which it is authorized when adequate remedy is provided by statute for contesting the election.<sup>32</sup> And the existence of such a remedy is also sufficient ground for refusing to enjoin county commissioners from ordering an election to pass upon the question of removal.<sup>33</sup> So when a board of county commissioners are clothed by law with exclusive authority to receive petitions for the removal of the county seat, and to order an election upon the question of removal, and acting within the jurisdiction thus conferred they have received such a petition, passed upon its sufficiency, and ordered the election, no objection being interposed to their action until after such election in which complainants participated, the removal of the county offices to the new location will not be enjoined because of insufficiencies in the petition for re-location.<sup>34</sup> And where the power to pass upon and determine the question of removal of a county seat is conferred by law upon a particular tribunal, as a county court, a court of equity will not review the action of such tribunal upon the question of removal, and will not enjoin the commissioners which it has appointed for that purpose from making the removal.<sup>35</sup> And where commissioners have been appointed and are proceeding under an act of the legislature to locate the county line, their acts in so doing will not be enjoined upon the ground that they were not locating the line correctly.<sup>36</sup>

§ 1258. **The same.** Upon similar principles, it is held that where a board of county commissioners have jurisdiction over

<sup>31</sup> *Markle v. Board of Commissioners*, 55 Ind., 185.

<sup>32</sup> *Scott v. McGuire*, 15 Neb., 303, 18 N. W., 93; *Todd v. Rustad*, 43 Minn., 500, 46 N. W., 73.

<sup>33</sup> *Weber v. Timlin*, 37 Minn., 274, 34 N. W., 29. But see *Slingerland v. Norton*, 59 Minn., 351, 61 N. W., 322.

<sup>34</sup> *Ellis v. Karl*, 7 Neb., 381.

<sup>35</sup> *Sanders v. Metcalf*, 1 Tenn. Ch., 419.

<sup>36</sup> *Board of Commissioners v. Thorn*, 117 N. C., 211, 23 S. E., 184. In this case it is difficult to tell whether the relief was denied because the court concluded that the

the removal and re-location of a county seat, and have properly acquired jurisdiction of an application for such removal, the presumption in equity will be in favor of the regularity of their proceedings; and although their action may be erroneous or irregular, it can not be attacked in a collateral proceeding, such as a bill to enjoin.<sup>37</sup> And when a county board of supervisors, pursuant to statute, have submitted to a vote of the people the question of a removal of the county seat, the board acting as a *quasi* judicial tribunal to determine preliminary questions, such as the sufficiency of a petition of citizens to submit the question of removal to a vote, their decision will be deemed conclusive when collaterally attacked, and will not be reviewed in equity upon an application to enjoin such removal. In other words, the board having jurisdiction over the subject-matter, equity will not review their proceedings because of alleged irregularities or errors which might have been corrected at law, nor will it, because of such errors or irregularities, enjoin the proposed action.<sup>38</sup> Nor, in such case, will equity enjoin a board of supervisors from declaring the result of an election called by them upon a petition of citizens to determine the question of removing the county seat.<sup>39</sup> And it has been held that a citizen and taxpayer, as such, has not sufficient interest to maintain a bill to enjoin a county officer from removing his office, pending a controversy as to the proper location of the county seat, when he fails to show some special or private interest in the subject-matter, and when he does not sustain the relation of a public officer prosecuting for the benefit of the public.<sup>40</sup>

line was being correctly located or because a court of equity has no jurisdiction of such a case.

<sup>37</sup> Commissioners of Clay Co. v. Markle, 46 Ind., 96.

<sup>38</sup> Bennett v. Hetherington, 41 Iowa, 142.

<sup>39</sup> People v. Board of Supervisors, 75 Cal., 179, 16 Pac., 776.

<sup>40</sup> McMillen v. Butler, 15 Kan., 62. See also Caruthers v. Harnett, 67 Tex., 127, 2 S. W., 523. It has been held in Kansas, where upon proceedings in *mandamus* county

§ 1259. **Improper application to parliament enjoined.** Equity may interfere by injunction to prevent an abuse of their trust by municipal officers, in making an unauthorized application to parliament for the passage of a bill concerning municipal affairs. And where such officers are proceeding to have a bill introduced in such matter, in disregard of the requirements of their act of incorporation, it is proper upon a bill by taxpayers to restrain them from causing the application to be made in their corporate capacity, and from defraying its expenses out of the corporate funds.<sup>41</sup> So an injunction has been allowed to restrain a board of municipal officers from an application to parliament in disregard of a covenant which would be virtually annulled and rendered useless by the proposed legislation.<sup>42</sup>

§ 1260. **Failure to invoke remedy at law.** Acquiescence by a taxpayer in the construction of a work of public benefit, coupled with a failure to avail himself of a remedy provided by law for redress, will operate as an estoppel when he seeks the extraordinary aid of equity by injunction. Municipal officers will not, therefore, be enjoined from paying for a work of public improvement upon the ground of the invalidity of the contract under which the work has been performed, when the contractor has been permitted to go on under such contract and complete the work, expending a large sum of money in so doing, and when the work has been accepted and thrown open to the public, and complainant, having a plain and adequate remedy at law by appeal from the action of

officers have been ordered to remove their offices to a new location of the county seat, which has been selected by a vote of the people, but a subsequent vote results in the location at another place, that the execution of the former judgment of removal may be enjoined. *Scott v. Paulen*, 15 Kan., 162.

<sup>41</sup> *Attorney-General v. Commissioners of Kingstown*, 1 R. 7 Eq., 383. See also *Attorney-General v. Mayor of Waterford*, 1 R. 9 Eq., 522; *Solicitor-General v. Lord Mayor of Dublin*, 1 L. R. Ir. Ch. D., 166.

<sup>42</sup> *Telford v. Metropolitan Board of Works*, L. R. 13 Eq., 574.

the municipal officers, has failed to avail himself of such remedy.<sup>43</sup>

§ 1261. **Organization of municipalities not enjoined.** Equity is averse to interference by injunction with the formation of local governments or municipalities in accordance with law. And where proceedings are being had under the laws of a state for the incorporation of a village, property owners within the proposed village limits will not be permitted to enjoin such organization because the territory in question does not contain the requisite population, or because complainants would thereby be subjected to burdens of local government largely disproportionate to the benefits accruing therefrom, or upon the ground of informality in the proceedings. Nor will the relief be allowed in such case upon the application of the attorney-general, in behalf of the people of the state.<sup>44</sup> And a bill for an injunction can not be maintained to have declared null and void proceedings for the incorporation of a village under an act of legislature for the incorporation of villages, the appropriate remedy in such a case being by proceedings in the nature of a *quo warranto*.<sup>45</sup> For a like reason equity will not enjoin the holding of an election called for the purpose of electing city officers, in a proceeding the object of which is to test the question of the corporate existence of the city.<sup>46</sup> So the existence of the remedy by *quo warranto* is sufficient to prevent relief by injunction to restrain county officials from perfecting a newly adopted system of county government upon the ground that it has not been properly authorized by the electors as required by law.<sup>47</sup> And in conformity with the general doctrine that courts of equity will not revise the action of municipal bodies, or correct their errors, in matters resting within their jurisdiction and authority, an injunction will not be granted to restrain the organization

<sup>43</sup> Clark v. Dayton, 6 Neb., 192.

<sup>46</sup> Osborn v. Village of Oakland,

<sup>44</sup> Stephens v. Minnerly, 6 Thomp. 49 Neb., 340, 68 N. W., 506.  
& C., 318.

<sup>47</sup> Fort v. Thompson, 49 Neb.,

<sup>45</sup> People v. Clark, 70 N. Y., 518. 772, 69 N. W., 110.

of a school district which is being made by the proper municipal authorities under a power conferred upon them by law for that purpose, where the gravamen of the bill is that the officers have acted upon illegal and improper evidence upon the hearing of the application for the formation of such new district.<sup>48</sup>

§ 1262. **Municipality enjoined from issuing bonds or incurring debts in excess of constitution limit; joinder of municipality.** An injunction may be granted to restrain a municipal corporation from incurring debts in excess of the maximum fixed by the constitution of the state, or by the laws governing the municipality, as the limit to municipal indebtedness, upon a bill by a citizen and taxpayer of the municipality.<sup>49</sup> So a taxpayer may enjoin the issuance of municipal bonds the effect of which would be to increase the public indebtedness beyond the limits fixed by the constitution or organic law.<sup>50</sup> So equity will enjoin the supervisors of a county from levying a tax for the payment of bonds which, if issued, would increase the indebtedness of the county beyond the constitutional limitation. And in such case the county is not a necessary party to the proceeding where there is no attempt to divest it of any of its rights or to impose any liability upon it.<sup>51</sup> So the levy by a town of a tax in excess of the limit fixed by law, for the payment of a donation in aid of a rail-

<sup>48</sup> *Lane v. Morrill*, 51 N. H., 422.

<sup>49</sup> *City of Springfield v. Edwards*, 84 Ill., 626; *City of Chicago v. McDonald*, 176 Ill., 404, 52 N. E., 982; *City of Chicago v. Galpin*, 183 Ill., 399, 55 N. E., 731; *Davenport v. Kleinschmidt*, 6 Mont., 502, 13 Pac., 249; *Sackett v. City of New Albany*, 88 Ind., 473; *Spilman v. City of Parkersburg*, 35 West Va., 605, 14 S. E., 279. See also *Hudson v. Mayor*, 64 Ga., 286. See, as to the right to enjoin a county from contracting an indebtedness

in excess of the amount allowed by law in Indiana, *Miller v. Board of Commissioners*, 66 Ind., 162.

<sup>50</sup> *Fowler v. City of Superior*, 85 Wis., 411, 54 N. W., 800; *Board of Commissioners v. Spangler*, 159 Ind., 575, 65 N. E., 743; *Seymour v. City of Tacoma*, 6 Wash., 427, 33 Pac., 1059. See *Bruce v. Pittsburg*, 161 Pa. St., 517, 29 Atl., 584; *Kyes v. St. Croix County*, 108 Wis., 136, 83 N. W., 637.

<sup>51</sup> *Anderson v. Orient Fire Ins. Co.*, 88 Iowa, 579, 55 N. W., 348.

way, may be enjoined by a taxpayer who has paid that portion of the tax which is lawfully due.<sup>52</sup> And where, under its charter, a city is restricted in creating liabilities in any one year to the amount to be raised by taxation during such year, and payments upon contracts are to be made from the taxes for the year when such contracts are made, the city may be restrained from making a contract for lighting the streets extending over a term of years in the future.<sup>53</sup> So taxpayers may restrain the enforcement of bonds issued by a county for the purchase of lands for the erection of a court house, in violation of a statute limiting the expenditures of the county for any one year to the amount raised by taxation for that year.<sup>54</sup> Where, however, an injunction was granted against a city to restrain it from increasing its indebtedness by contract beyond the legal limit for works of municipal improvement, a delay of several months after the making of the contracts in seeking relief was held to constitute sufficient ground for dissolving the injunction.<sup>55</sup>

§ 1262 *a*. **Injunction against issuing of illegal bonds; plaintiff's right must be clear.** As to the right of a taxpayer to enjoin the issuing of illegal municipal bonds, a distinction has been drawn between cases where the bonds, if issued, would be good in the hands of innocent purchasers and those where their invalidity could be relied upon as a defense even as against such holders, the determination of this question depending upon whether there has been merely an irregular or wrongful exercise of the undoubted power to issue the bonds

<sup>52</sup> *Miles v. Ray*, 100 Ind., 166.

<sup>53</sup> *Putnam v. City of Grand Rapids*, 58 Mich., 416, 25 N. W., 330. But see, *contra*, *City of Valparaiso v. Gardner*, 97 Ind., 1, where it is held that a continuing contract made by a city for a supply of water for twenty years, at an annual expense of \$6,000, does not

create an indebtedness within the constitutional prohibition, and that an injunction will not lie in such case.

<sup>54</sup> *Crampton v. Zabriskie*, 101 U. S., 601.

<sup>55</sup> *Collings v. City of Camden*, 12 C. E. Green, 293.

or whether there is a total want of power upon the part of the municipality or its officers. And in the latter case it has been held that the taxpayer can not invoke the aid of equity to restrain the issuing of the obligations in question since there is no possibility of an increase in the burden of his taxation resulting from them.<sup>56</sup> Whether or not this distinction be good, it has met with no recognition from other courts, and injunctions are freely granted at the instance of complaining taxpayers to restrain the issuing of illegal municipal obligations without regard to their validity in the hands of innocent holders. Thus, a taxpayer may enjoin the issuing of county bonds where the act by which they purport to be authorized is unconstitutional.<sup>57</sup> So the relief will be allowed to restrain

<sup>56</sup> *Polly v. Hopkins*, 74 Tex., 145, 11 S. W., 1084. In this case Stayton, C. J., says: "The ground on which injunctions at the suit of tax payers are granted to restrain a municipal corporation from issuing bonds is, that the issuance will be illegal but under such circumstances as to make the bonds binding on the corporation if they go into the hands of innocent holders and thus render taxation necessary to raise funds to discharge them. If the Commissioners Court had directed the making of a contract which under some circumstances it would have power to make, which, however, under existing circumstances was unauthorized, then a tax payer might ask relief against the unauthorized act, if through it an indebtedness to anyone could arise and taxation to meet it be imposed. If the county judge or person with whom he is alleged to have made the unauthorized contract to build a jail for the county see proper to erect

it without obligation on the county to pay for it, we do not see that the tax payer has any ground for injunction. His right to such relief depends on the fact that without it a burden which he must bear will be placed on him by an illegal act. The tax payer is not the guardian of the good name of his county, as appellees seem to suppose themselves to be, nor is it for him or them to determine what the county does or does not need, or what contracts are advantageous or improvident, otherwise than as represented by the commissioners elected." But in *Fowler v. City of Superior*, 85 Wis., 411, 54 S. W., 800, where it was sought to make the same distinction, the court refused to withhold the relief, holding that the question of the validity of the bonds in the hands of innocent holders could not thus be adjudicated in their absence.

<sup>57</sup> *Baltimore & E. S. R. Co. v. Spring*, 80 Md., 510, 31 Atl., 208, 27 L. R. A., 72; *Hetland v. County*

county officers from issuing bonds to pay an illegal and invalid indebtedness of the county.<sup>58</sup> So the relief will be granted upon the ground that the question of the issuance of the bonds has never been submitted to the vote of the electors.<sup>59</sup> So the writ will be allowed where the ordinance or resolution under which the bonds are about to be issued fails to conform to the substantial requirements of the statute by which they are authorized.<sup>60</sup> So a taxpayer may enjoin the issuing of city bonds for the payment of an assessment for public improvements, when such assessment is void.<sup>61</sup> But in order to entitle a taxpayer to relief, his right and the injury to him must be free from doubt, and where it appears that resort to taxation will not have to be had in order to secure payment of the bonds, the writ will be denied.<sup>62</sup>

§ 1263. **Misapplication of school funds; removal of school house.** Where a particular fund is to be appropriated to all the public schools in a township for their support, but it is being wrongfully appropriated for the support of one school to the exclusion of others, a citizen and taxpayer of the township is entitled to an injunction to prevent such improper application of the fund.<sup>63</sup> And it would seem that an injunction is the appropriate remedy, in behalf of the taxable inhabitants of a school district, to restrain the township treasurer from paying out money for the erection of a school house at a place other than that authorized by law.<sup>64</sup>

Commissioners, 89 Minn., 492, 95 N. W., 305. And see cases cited in note 50, on page 1276, *ante*.

<sup>58</sup> *Dunbar v. County Commissioners*, 5 Idaho, 407, 49 Pac., 409, which in effect overrules *Morgan v. County Commissioners*, 4 Idaho, 418, 39 Pac., 1118, in which it was held that the relief should be denied where the aggrieved taxpayer had a statutory remedy by appeal from the action of the county authorities.

<sup>59</sup> *Hoffman v. Board of Commissioners*, 18 Mont., 224, 44 Pac., 973.

<sup>60</sup> *Kyes v. St. Croix County*, 108 Wis., 136, 83 N. W., 637; *Coffin v. Richards*, 6 Idaho, 741, 59 Pac., 562.

<sup>61</sup> *Schumacker v. Toberman*, 56 Cal., 508.

<sup>62</sup> *Fellows v. Walker*, 39 Fed., 651.

<sup>63</sup> *Maloy v. Madget*, 47 Ind., 241.

<sup>64</sup> *Marble v. McKenney*, 60 Me., 332.



And where municipal officers are enjoined from the performance of an official act, such as the removal of a school house, upon the ground of a want of authority, if the answer fails to show a clear right to the performance of the act in question, the injunction should be continued to the hearing.<sup>65</sup> And where municipal officers are proceeding to issue bonds of the municipality for the erection of a school house, without compliance with a statute requiring an election to be held to authorize such indebtedness, they may be enjoined.<sup>66</sup> But the authorities of a school district will not be enjoined from removing a school house to another site when the plaintiff does not show that he will sustain any special or peculiar injury, different from that to the public.<sup>67</sup>

§ 1264. **Interference with receiver.** A receiver appointed over certain property who is entitled to its possession, holding and renting it for the benefit of all parties interested in the litigation, may maintain an action for an injunction against the authorities of a municipal corporation who interfere with his possession and attempt to collect the rents of the property in question.<sup>68</sup>

§ 1265. **Theatrical entertainment without license.** Where a statute prohibits any theatrical or dramatic entertainment in a city unless duly licensed by the mayor, and provides for the granting of an injunction to restrain the opening of any such entertainment until a license shall have been obtained, the right to an injunction under the statute is not affected or impaired by a subsequent statute which makes the giving of such performance upon Sunday a misdemeanor, and punishes it accordingly.<sup>69</sup>

<sup>65</sup> *Trotter v. Paunley*, 39 Iowa, 203.

<sup>66</sup> *Bowen v. Mayor of Greenesboro*, 79 Ga., 709, 4 S. E., 159.

<sup>67</sup> *Parody v. School District*, 15 Neb., 514, 19 N. W., 633.

<sup>68</sup> *Grant v. City of Davenport*, 18 Iowa, 179.

<sup>69</sup> *Society v. Diers*, 60 Barb., 152; S. C., 10 Ab. Pr. N. S., 216.

§ 1266. **Denial of right of appeal.** The fact that a board of municipal officers are proceeding in the exercise of certain arbitrary powers conferred upon them by law, without leaving to the person affected by their proceedings the right of appeal allowed him by law, has been held to constitute sufficient ground for enjoining their action.<sup>70</sup>

§ 1267. **Employment of additional counsel by city.** Where the charter of a city provides that its solicitor shall represent it in all suits in which its property or rights are involved, an injunction will not be allowed for the purpose of preventing the common council of the city from employing another attorney in its suits, the remedy by injunction not being regarded as appropriate to such a case.<sup>71</sup>

§ 1268. **Holder of county order and city bond.** The holder of a county order is treated as a mere general creditor of the county, and as such he can not, before judgment on such order and the return of an execution *nulla bona*, enjoin the county from the exercise of its general right to manage and dispose of its property.<sup>72</sup> But the holder of a city bond may restrain the city council from issuing bonds, under an act of legislature in violation of the act under which the first bonds were issued, the former act providing that the city should thereafter issue no bonds except for the payment of its indebtedness. Such a provision in the original act becomes a part of the contract, and its violation by the city may be properly enjoined.<sup>73</sup> But a court of equity will not interfere

<sup>70</sup> Tinkler v. Board of Works, 1 Gif., 412.

<sup>71</sup> Hugg v. City of Camden, 29 N. J. Eq. (2 Stew.), 6.

<sup>72</sup> Montague v. Horton, 12 Wis., 599. And it is held in this case that the code of procedure has not enlarged the former jurisdiction of courts of equity to grant injunctions restraining the proceedings

of subordinate tribunals, or the official acts of public officers, except in the case of temporary injunctions *pendente lite*, which may be granted under the code, whether the action be legal or equitable.

<sup>73</sup> Smith v. Appleton, 19 Wis., 468.

in behalf of a county to enjoin the payment of a debt which has the sanction of moral obligation.<sup>74</sup>

§ 1269. **Use of school house for other than school purposes enjoined.** A misappropriation or wrongful use of corporate property is a fraud upon the rights of corporators, and may be prevented by the aid of equity, where courts of law are powerless to grant the necessary relief. Thus, the use of a school house by the inhabitants of a school district for religious purposes, against the wishes of any taxpayer of the district, is an improper use of the corporate property, although the district may have voted to permit such use. And in such case any taxpayer of the district is entitled to an injunction, although the injury sustained by him in person be slight, since he can have no adequate remedy at law.<sup>75</sup> So the use of a school house for other than school purposes may be enjoined, even though the directors of the district and a majority of its taxpayers and electors consent to such use. And in such case a single resident and taxpayer of the district, whose children attend school therein, and whose books are injured and destroyed by such improper use of the school house, has a sufficient interest to maintain a bill for an injunction.<sup>76</sup> So the authorities of a school district may be enjoined at the suit of a taxpayer from leasing a public school house for the purpose of keeping a private school.<sup>77</sup>

§ 1269 *a*. **Municipality can not enjoin use of its corporate name.** A municipal corporation, under the powers usually conferred upon such organizations, has no such property right

<sup>74</sup> County Commissioners *v.* Hunt, 5 Ohio St., 488.

<sup>76</sup> Spencer *v.* School District, 15 Kan., 259.

<sup>75</sup> Scofield *v.* Eighth School District, 27 Conn., 499. See also Hurd *v.* Waters, 48 Ind., 148; Spencer *v.* School District, 15 Kan., 259. But see, *contra*, Bell *v.* City of Platteville, 71 Wis., 139, 36 N. W., 831.

<sup>77</sup> Weir *v.* Day, 35 Ohio St., 143. As to the right to enjoin school directors from changing the text books used in a public school, see School District No. 1 *v.* Shadduck, 25 Kan., 467.

in the use of its corporate name as will entitle it to invoke the aid of equity against an improper use of that name by another. Accordingly it can not maintain a bill to enjoin a railroad company which runs through it from applying its corporate name to a nearby station located upon the road.<sup>78</sup>

§ 1269 *b*. **City enjoined from enforcing discriminating water rates.** A water company may enjoin a city from establishing and enforcing water and sewer rates which unjustly discriminate in favor of the users of water supplied by the municipality and against the users of water furnished by complainant, where it appears that such discriminating rates will result in irreparable injury to the complainant's business.<sup>79</sup>

§ 1269 *c*. **When injunction denied against payment of illegal municipal warrants; when payment of void judgment against municipality not enjoined.** While a taxpayer may enjoin a municipality from paying warrants which are illegal and void for want of authority upon the part of the municipality to borrow the money represented by the warrants, yet where the money loaned to the municipality and evidenced by the warrants has been devoted by the municipality to authorized corporate purposes, whereby the municipality has become legally indebted to the lender in an amount equal to

<sup>78</sup> *Gulf & Ship Island R. Co. v. Town of Seminary*, 81 Miss., 237, 32 So., 953. Defendant was a railroad company operating a road through complainant which was a municipal corporation chartered under the name of Town of Seminary. Defendant had established a station upon its road about one-half mile distant from complainant, to which it had applied the name Seminary, thus causing great confusion among passengers and shippers of freight. It was held that complainant could not enjoin

this use of its corporate name. The court say: "The town of Seminary, as a legal person created by law, has only the powers conferred upon it by law, and none known to us can authorize it to bring suits for the grievances set out in the bill. The grievances set out are not grievances of the town of Seminary as a political corporation. The rights invaded are not rights of the municipality. The bill is not maintainable."

<sup>79</sup> *City of Mobile v. Bienville W. S. Co.*, 130 Ala., 379, 30 So., 445.

the amount of the warrants, a court of equity will not grant an injunction to restrain their payment.<sup>80</sup> Nor will an injunction lie at the suit of a taxpayer to restrain a county collector from paying the amount of an alleged void judgment which has been rendered against the county, where such judgment is based upon warrants which were duly issued by the proper authorities and which are conceded to be valid.<sup>81</sup>

<sup>80</sup> *Allen v. Intendant of La Fayette*, 89 Ala., 641, 8 So., 30, 9 L. R. S. W., 709.  
<sup>81</sup> *Bush v. Wolf*, 55 Ark., 124, 17 A., 497.

## II. MUNICIPAL IMPROVEMENTS.

- § 1270. Discretion of municipal bodies not interfered with.  
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## § 1270. Discretion of municipal bodies not interfered with.

The general principle already stated denying relief by injunction against the action of municipal bodies in matters properly resting within their jurisdiction, in the absence of fraud, applies with especial force to cases where the relief is sought against the construction by municipal corporations of works of public improvement, such as streets, bridges, public buildings, sewers and other like works pertaining to municipal government. And whenever such matters have been intrusted by law to the judgment and discretion of municipal officers or boards, equity will not revise or control the exercise of their discretion, or interfere with their action in the absence of fraud, and while they continue to act within the scope of the powers conferred upon them by law.<sup>1</sup> Thus, where the

<sup>1</sup> *Inhabitants of Greenville v. Walker*, 77 Ga., 336; *Goszler v. Seymour*, 7 C. E. Green, 458; *Sugar Corporation of Georgetown*, 6 *Refining Company v. Mayor*, 11 Wheat., 593; *Torrent v. Common C. E. Green*, 247; *Morris v. Mayor*, Council, 47 Mich., 115, 10 N. W., 10 C. E. Green, 345; *Mayor v. Eldridge*, 64 Ga., 524; *Bacon v. ton*, 102 N. Y., 500, 7 N. E., 424;

common council of a city are made by law judges of the necessity for a work of public improvement, such as a street, and have contracted therefor, the work and the contract being within the scope of their powers, in the absence of any evidence of fraud equity will not interfere by injunction in behalf of property owners to restrain the execution of the contract.<sup>2</sup> And where the authorities of a city are fully empowered to alter and change the grade of streets, equity will not enjoin them from proceeding to make such change, if they are acting within the scope of their authority.<sup>3</sup> Nor will municipal officers be enjoined from changing the grade of a street at the suit of one who shows no substantial injury as likely to result from their action.<sup>4</sup> Nor will they be restrained from lawful proceedings for the vacation of a street.<sup>5</sup> So they will not be restrained from opening a highway through plaintiff's premises upon the ground of irregularities in their proceedings, when the injury sustained may be readily fixed and compensated in damages.<sup>6</sup> Nor will a taxpayer be permitted to enjoin the authorities of a city from erecting public buildings, when no probable injury is shown as likely to result from such erection.<sup>7</sup> And municipal officers will not be enjoined from opening a public street after the repeal of the act under which the proceedings were had, an injunction being unnecessary in such case.<sup>8</sup> And the vacation of a street will not be enjoined upon the application of a lot owner not immediately affected, his lots being located in another block, where the street is left of full width, access to his lots being

*Dever v. City of Junction City*, 45 Kan., 417, 25 Pac., 861. See also *Montgomery v. Orr*, 27 Fed., 675.

<sup>2</sup> *Morris v. Mayor*, 10 C. E. Green, 345.

<sup>3</sup> *Goszler v. Corporation of Georgetown*, 6 Wheat., 593.

<sup>4</sup> *City of Kokomo v. Mahan*, 100 Ind., 242.

<sup>5</sup> *Meredith v. Sayre*, 32 N. J. Eq., 557.

<sup>6</sup> *Smith v. Weldon*, 73 Ind., 454.

<sup>7</sup> *City of Richmond v. Davis*, 103 Ind., 449, 3 N. E., 130.

<sup>8</sup> *Cohen v. Gray*, 70 Cal., 85, 11 Pac., 508.

undisturbed.<sup>9</sup> So when the authorities of a city are made the judges of the necessity for extending a street, or for the construction of a bridge as a continuation of a street, equity will not review their judgment or conclusions upon a bill to enjoin such proposed action, in the absence of any allegations of fraud.<sup>10</sup> Nor will a court of equity interfere by injunction with the action of a board of commissioners empowered to establish and repair streets and to make municipal improvements, when they are acting within the scope of their legal authority, however impolitic or oppressive may be the law under which they are acting, since the remedy for such grievances must be sought at the hands of the legislature and not of the courts.<sup>11</sup> And the removal by municipal officers of obstructions from streets being a necessary exercise of the ordinary police powers of municipal government, it can not be enjoined as a trespass.<sup>12</sup>

§ 1271. **Proceedings in excess of municipal powers enjoined.** Still having in view the question of power or jurisdiction on the part of the municipal body as the controlling question in determining whether preventive relief shall be allowed against their action, the rule is well established that when a municipal corporation is proceeding in excess of its powers, or in the total absence of all power or jurisdiction in the premises, to construct works of public improvement, which are likely to result in irreparable injury to property owners, an injunction is the appropriate means of relief.<sup>13</sup> And

<sup>9</sup> *Heller v. Atchison, T. & S. F. R. Co.*, 28 Kan., 625. See also *City of Chicago v. Union Building Association*, 102 Ill., 379; *McGee's Appeal*, 114 Pa. St., 470, 8 Atl., 237. And see, *ante*, § 818.

<sup>10</sup> *Sugar Refining Company v. Mayor*, 11 C. E. Green, 247.

<sup>11</sup> *Inhabitants of Greenville v. Seymour*, 7 C. E. Green, 458.

<sup>12</sup> *Sheen v. Stothart*, 29 La. An., 630.

<sup>13</sup> *Armstrong v. City of St. Louis*, 3 Mo. App., 151; *Town of Covington v. Nelson*, 35 Ind., 532; *Conrad v. Smith*, 32 Mich., 429; *Carter v. City of Chicago*, 57 Ill., 283; *Dinwiddie v. President of Rushville*, 37 Ind., 66; *State v. Commissioners of Marion Co.*, 21 Kan., 419; *Same v. Same*, *Ib.*, 437. See also *Middleton v. Greeson*, 106 Ind., 18, 5 N. E., 755; *Robertson v. Breedlove*, 61 Tex., 316.



where a board of municipal officers, such as the trustees of a town, are authorized by law to make street improvements upon petition by a majority of the lot owners resident upon the street, such petition being necessary to the jurisdiction of the board, a court of equity may enjoin contractors from proceeding with such improvements under an ordinance passed without the necessary petition.<sup>14</sup> And it is proper, in such case, for one resident and taxpayer of the town to institute the action in behalf of himself and all others interested in the subject-matter of the suit and the relief sought.<sup>15</sup> And where the power of a city to make street improvements, such as paving, is dependent upon a petition of a majority of the frontage to be affected and the publication of a notice, and property owners are entitled to be heard as to whether there has been a compliance with such conditions and such hearing has been denied them, they may enjoin the execution of an ordinance for the improvement until a hearing is afforded them.<sup>16</sup> So when a city has no authority to change the grade of a street once established, when improvements have been made with reference to such grade, without payment of the damages caused by the change, an abutting property owner may enjoin the city from making the change when his damages have not been assessed or paid.<sup>17</sup> And a city has been enjoined from changing the name of a street, upon a bill by householders and persons doing business on such street showing that serious injury would result to them from the change, the city having no statutory authority for its action.<sup>18</sup> And a taxpayer may enjoin a city from issuing bonds in payment of an assessment for a public improve-

<sup>14</sup> *Town of Covington v. Nelson*, 35 Ind., 532. See also *Makemson v. Kauffman*, 35 Ohio St., 444.

<sup>15</sup> *Town of Covington v. Nelson*, 35 Ind., 532.

<sup>16</sup> *Dennison v. City of Kansas*, 95 Mo., 416, 8 S. W., 429.

<sup>17</sup> *Phillips v. City of Council Bluffs*, 63 Iowa, 576, 19 N. W., 672. And see, *ante*, § 587.

<sup>18</sup> *Anderson v. Lord Mayor*, 15 L. R. Ir., 410.

ment, when such assessment is void.<sup>19</sup> So where city authorities are about to change the grade of and to open a street, in violation of the powers conferred by their charter and without authority of law, they may be enjoined from proceeding at the suit of an adjacent property owner.<sup>20</sup> So, too, when public improvements are being made under a town ordinance which is illegal and void, an injunction is the proper remedy in behalf of property owners, inasmuch as the title to their property may be clouded by an apparent lien for the expense of such improvements.<sup>21</sup> So the supervisors of adjoining counties may be enjoined, at the suit of a taxpayer, from constructing and maintaining a ferry at joint expense over a river between the counties, no such power being conferred upon them by statute, their power being limited to the operation of ferries within the county.<sup>22</sup> And where a board of highway commissioners of a town, acting in excess of their powers and without legal authority, are about to construct a ditch in front of complainant's premises which is likely to result in irreparable injury, they may be restrained from proceeding. Nor is complainant estopped from relief in such case by the fact that he had bid for and received the work at a public bidding, when his bid was made for the purpose of controlling the work and holding it in abeyance until he could apply for an injunction.<sup>23</sup> And a municipal corporation may be restrained from opening a new street and from collecting an assessment therefor from adjacent lot owners, when the proceedings of the corporation appear to be regular upon their face, but are in fact invalid, and when extrinsic evidence is necessary to establish their invalidity.<sup>24</sup> It is to be understood, however, that

<sup>19</sup> *Schumacker v. Toberman*, 56 Cal., 508. And see, *ante*, § 1262a.

<sup>20</sup> *Armstrong v. City of St. Louis*, 3 Mo. App., 151.

<sup>21</sup> *Dinwiddie v. President of Rushville*, 37 Ind., 66.

<sup>22</sup> *Johnston v. County of Sacramento*, 137 Cal., 204, 69 Pac., 962.

<sup>23</sup> *Conrad v. Smith*, 32 Mich., 429.

<sup>24</sup> *Miller v. Mayor of Mobile*, 47 Ala., 163. And it is said in this case that the exceptions to the

equitable relief in these cases is granted only in the absence of an adequate remedy at law. And a court of equity will not restrain municipal officers from tearing up a sidewalk in front of complainant's premises and replacing it with a new one because of a want of authority, when relief may be had at law by resisting the enforcement of any tax or assessment that may be levied in payment for such work.<sup>25</sup>

§ 1272. **Interference with private property enjoined.** Relief by injunction may also be granted to prevent municipal officers from attempting to take possession of private property upon the pretense that it has been dedicated as a public street or highway by the owner, when, in fact, there has been no such dedication, or if it ever occurred the easement has been lost through non-user and abandonment by the city, and by a continuous and adverse possession on the part of the owner of the fee for more than twenty years.<sup>26</sup> And when municipal officers threaten the removal of complainants' buildings upon the ground that they encroach upon a public street, but complainants have been in uninterrupted possession for more than twenty years under claim of legal title, it is proper to restrain the municipal authorities from interfering with the buildings until the question of title may be determined at law.<sup>27</sup> So the owner of town property, who has never dedicated it to the use of the public as a street, may restrain the town from opening streets through such land without

doctrine of non-interference with the proceedings of municipal or public officers in the discharge of their duties are comprised in three classes; first, where the proceedings of the subordinate or municipal tribunal will necessarily lead to a multiplicity of suits; second, where they lead in their execution to the commission of irreparable injury to the freehold; third, where an adverse claim is asserted

to the realty which is valid upon its face, and extrinsic facts must be shown to establish its invalidity or illegality.

<sup>25</sup> *Brush v. City of Carbondale*, 78 Ill., 74.

<sup>26</sup> *City of Peoria v. Johnston*, 56 Ill., 45. See also *Wetherell v. Town of Newington*, 54 Conn., 67, 5 Atl., 858.

<sup>27</sup> *Manchester Cotton Mills v. Town of Manchester*, 25 Grat., 825.

having taken the necessary legal steps for its condemnation.<sup>28</sup> And such property owner may restrain the town authorities from constructing pavements upon his land which he has not dedicated to the public use, and when the land has not been condemned for such purpose.<sup>29</sup> But a property owner seeking to restrain a city from appropriating his property for a public street must not only show that it has never been granted for that purpose, but that there has been no implied dedication.<sup>30</sup> And a municipal corporation will not be enjoined from opening a public street through plaintiff's premises, upon the ground that it has not acquired the right so to do, when it is doubtful upon the facts shown whether the city has not already acquired such right.<sup>31</sup>

§ 1273. **The same; adequate remedy at law no bar to relief; property owners not enjoined.** A municipal corporation which is about to make a permanent appropriation of private property to the use of the public, without having taken requisite steps to determine the necessity for such appropriation, may be enjoined from so doing.<sup>32</sup> And the officers of a school district may be restrained from entering upon and taking possession of plaintiff's property for the erection of a school house, without his assent and without ascertaining and paying his damages in the manner provided by law.<sup>33</sup> So, too,

<sup>28</sup> *Pierpont v. Town of Harrisville*, 9 West Va., 215; *Yates v. West Grafton*, 33 West Va., 507, 11 S. E., 8. See also *Uren v. Walsh*, 57 Wis., 98, 14 N. W., 902.

<sup>29</sup> *Boughner v. Town of Clarksburg*, 15 West Va., 394. See as to the effect of the repeal of a city ordinance for the improvement of a street upon an injunction previously granted against such improvement, *Kaime v. Harty*, 4 Mo. App., 357.

<sup>30</sup> *Faust v. City of Huntington*, 91 Ind., 493. But it is held in Iowa that a property owner may

enjoin a road supervisor from removing a fence along the line of a highway adjoining plaintiff's premises, until the right to make such removal may be determined. *Bolton v. McShane*, 67 Iowa, 207, 25 N. W., 135.

<sup>31</sup> *Bass v. City of Shakopee*, 27 Minn., 250, 4 N. W., 619, 6 N. W., 776.

<sup>32</sup> *Lumsden v. Milwaukee*, 8 Wis., 485.

<sup>33</sup> *Church v. Joint School District No. 12*, 55 Wis., 399, 13 N. W., 272.

municipal officers may be enjoined from converting private property to the uses of a public street without having made compensation therefor to the owner of the fee.<sup>34</sup> So where a municipality is about to construct public improvements which will result in actual physical injury to plaintiff's property, such work will be enjoined until compensation for the injury is made.<sup>35</sup> And in accordance with the rule which governs in cases where a railroad is taking private property without compensation,<sup>36</sup> a municipal corporation will be enjoined from appropriating plaintiff's property for a public use without condemnation and compensation wholly regardless of the solvency of the defendant and of the fact that an adequate remedy may exist at law.<sup>37</sup> But a court of equity will not, at the suit of a municipal corporation, enjoin individual owners of property, to be affected by the proposed opening of a street, from making improvements and building thereon, when the corporation has only taken the initiatory steps toward opening the street, and the provisions of the statute have not yet been complied with. In such case the corporation showing no vested right, either legal or equitable, which is likely to be injured by the proposed action, it is not entitled to the aid of equity.<sup>38</sup>

§ 1274. **Illustrations of the general doctrine.** Where a municipal corporation has complied with all the statutory requirements for the opening of a street, its proceedings will not be enjoined upon mere general averments in the bill of complainant's belief of collusive and partial conduct on the part

<sup>34</sup> *Folley v. City of Passaic*, 11 32 N. J. Eq., 586. And see, *ante*,  
C. E. Green, 216; *Mason City S. &* § 578.  
*M. Co. v. Mason*, 23 West Va., 211;  
*Winslow v. Nayson*, 113 Mass., 411. <sup>35</sup> *Niehaus v. Cooke*, 134 Ala., 223,  
32 So., 728.  
See also *Ruhland v. Jones*, 55 Wis.,  
673, 13 N. W., 689. But see, *con-* <sup>36</sup> § 622, *ante*.  
*tra*, *Mayor v. Gardner*, 33 N. J. <sup>37</sup> *City Council of Montgomery v.*  
*Eq.*, 622, reversing *S. C. sub nom.* *Lemle*, 121 Ala., 609, 25 So., 919.  
*Gardner v. Mayor of Jersey City*, <sup>38</sup> *New York v. Mapes*, 6 Johns.  
*Ch.*, 46.

of the corporate authorities.<sup>39</sup> And where by the charter of a city its corporate authorities are vested with exclusive control over the streets, and they grant permission to a railway company to locate its tracks along the line of a certain street, the owners of property fronting thereon will not be permitted to enjoin the laying of the track.<sup>40</sup> But after a street has been regularly laid out and opened of a specified width, the common council can not authorize owners of adjoining lots to reduce the width, and may be restrained from attempting so to do.<sup>41</sup> So, too, the corporate authorities of a town may be enjoined from encroaching upon the property of private citizens, although such encroachment is made under pretense of preventing obstructions to streets and alleys.<sup>42</sup>

§ 1275. **Misappropriation of land dedicated to public use.** The rule may be broadly stated, that courts of equity have undoubted jurisdiction to interfere by injunction when the corporate authorities of a city are taking improper or illegal proceedings, under claim of right, to do an act injurious to the rights of citizens and property holders. Thus, where land has been dedicated to a particular purpose, as a public street or square, and the common council of a city have appropriated it to another and an entirely different purpose, sufficient ground exists for an injunction, at the suit of the owners of lots adjacent to the street or square which it is sought to appropriate to a use other than that for which it was originally designed.<sup>43</sup>

<sup>39</sup> *Champlin v. Mayor*, 3 Paige, 573.

<sup>40</sup> *Moses v. Pittsburg, Ft. Wayne & C. R. Co.*, 21 Ill., 516.

<sup>41</sup> *Lawrence v. Mayor*, 2 Barb., 577.

<sup>42</sup> *Dudley v. Trustees*, 12 B. Mon., 610.

<sup>43</sup> *Cooper v. Alden, Harring. (Mich.)*, 72; *Marshall v. Commis-*

*sioners*, 89 N. C., 103; *Rowzee v. Pierce*, 75 Miss., 846, 23 So., 307, 40 L. R. A., 402, 65 Am. St. Rep., 625; *Douglass v. City Council*, 118 Ala., 599, 24 So., 745, 43 L. R. A., 376. And see this last case as to whether a resident taxpayer who is not an abutting owner may maintain the action. And see *ante*, § 855.

§ 1276. **Opening streets over lands of state; construction of additional street railway.** The power which is conferred by a state upon a municipal corporation to lay out streets is not an absolute power to be asserted as against the state itself, but is subordinate to the sovereign power of the state over its own lands. Such corporation may, therefore, be restrained from laying out its streets over lands of the state without its consent being first obtained, since in delegating to a municipality the power to lay out streets, the state can not be presumed to have granted authority to do so against its own sovereign rights over its own property, without its consent.<sup>44</sup> So, notwithstanding the grant or dedication by the state to a municipal corporation of the streets and public squares of a city, such grant must be construed to have been made subject to the right of eminent domain. And there is still reserved in the legislative power of the state the right to modify the grant in future by imposing an additional servitude upon the streets, as by granting to a corporation the power to operate a street railway over them. A court of equity will not, therefore, grant an injunction in behalf of the municipality to restrain the construction of a street railway in a city, when it has been duly authorized by act of legislature.<sup>45</sup>

§ 1277. **Police power; closing street by land owner.** Courts of equity are averse to interfering with the exercise of the police powers conferred by law upon municipal authorities, such as the power to keep open the public streets of a city, and will not ordinarily grant an injunction for this purpose. And where a city has occupied and used a strip of ground for many years as a public street, the original proprietor of the land will not be allowed to enjoin the city authorities from going upon the land, or keeping it open for public use, or preventing complainant from fencing it.<sup>46</sup> But

<sup>44</sup> *Mayor of Atlanta v. The Central R. Co.*, 53 Ga., 120.      <sup>45</sup> *City of Chicago v. Wright*, 69 Ill., 318.

<sup>46</sup> *Savannah & Thunderbolt R. Co. v. The Mayor*, 45 Ga., 602.

a municipal corporation which, in the exercise of the right of eminent domain, has taken private land for public purposes, as in the opening of a public street, is entitled to an injunction to prevent the closing up of the street by the land owner, upon tendering him the amount of his damages as awarded in the condemnation proceeding.<sup>47</sup>

§ 1278. **Construction of sewers.** A municipal corporation may be restrained at the suit of private land owners from laying a sewer through property claimed by complainants as their own private property, when the authority of the corporation is limited to laying sewers in the public streets.<sup>48</sup> But a property owner in a city can not enjoin the construction of a sewer because of omissions and irregularities in the proceedings of the city authorities in opening the streets, the proper remedy being at law by the writ of *certiorari*. Nor in such case will the relief be granted because the contract entered into by the city with the builders of the sewer is defective in form or in the parties thereto.<sup>49</sup> And when complainants have knowingly permitted a city to take possession of their land and to expend a large amount of public funds in preparing it for use as a public highway, and have encouraged such expenditure of money by their inaction, they will not be allowed to enjoin the city from the construction of a sewer over the land in question.<sup>50</sup>

§ 1279. **Grading public streets; actual danger necessary; effect of laches.** A court of equity will not enjoin municipal officers from grading and improving certain land lying within a town as public streets, upon the application of one claiming to be the owner of such land, but who fails to show any title to the premises, a mere naked possession being insuf-

<sup>47</sup> *Jersey City v. Fitzpatrick*, 3 affirmed on appeal, 33 How. Pr., Stew., 97.

39. See *Wiseman v. Lucksinger*,

<sup>48</sup> *Clark v. City of Providence*, 84 N. Y., 31.

10 R. I., 437.

<sup>50</sup> *Traphagen v. Mayor*, 29 N. J.,

<sup>49</sup> *Kelsey v. King*, 32 Barb., 410, Eq. (2 Stew.), 206.



ficient to warrant the relief in such case.<sup>51</sup> And to warrant the relief in this class of cases it must clearly appear that the municipal authorities are proceeding illegally, under claim of right, to open the road or highway over plaintiff's premises; and the fact that a municipal officer has directed plaintiff to remove all obstructions upon the proposed route will not of itself warrant an injunction.<sup>52</sup> So a taxpayer seeking to enjoin the completion of a public improvement must use due diligence in asserting his right. And when he has permitted the work to proceed and the contractor to incur liabilities in good faith in its construction, he will be denied relief by injunction.<sup>53</sup>

§ 1280. **Raising approach to bridge.** In conformity with the general doctrine denying equitable interference with matters resting in the discretion of municipal officers, it is held that where the common council of a city are invested with the power of building bridges in the city, which includes of necessity the power of making such approaches thereto as are necessary for their convenient use, the whole matter resting in their sound discretion, they will not be enjoined at the suit of an adjacent lot owner, owning the fee to the center of the street, from raising the grade of the street for the purpose of making a suitable approach to the bridge.<sup>54</sup>

§ 1281. **Contract for paving street.** Where the proper authorities of a city have entered into a contract for the paving of a public street, the contract itself being proper and within the power of the city, equity will not, at the suit of property owner upon the street in question, enjoin the contractor from proceeding in violation and disregard of his contract.<sup>55</sup>

<sup>51</sup> *Gleason v. Jefferson*, 78 Ill., 399.

<sup>52</sup> *Weiss v. Jackson County*, 9 Ore., 470.

<sup>53</sup> *Brown v. Merrick Co.*, 18 Neb., 355, 25 N. W., 356.

<sup>54</sup> *Gray v. City of Brooklyn*, 7 Hun, 632.

<sup>55</sup> *McCafferty v. McCabe*, 4 Ab. Pr., 57; S. C., 13 How. Pr., 275.

§ 1281 *a*. **Vested rights in streets; gas, water, telegraph and street railway companies.** A city may be enjoined from interfering with vested rights in its streets, such as the right to lay gas or water pipes or conduits for telephone wires for the purpose of serving and supplying the city and its inhabitants. And when such privileges have been lawfully granted, either by a city itself which is duly authorized to make such grant, or when the right is conferred by charter upon a corporation, the acceptance of the grant and the construction of the works entitle the grantee to protection by injunction against interference or obstruction by the municipal authorities.<sup>56</sup> And in such case the city officials may be enjoined from arresting and prosecuting plaintiff's employees while engaged in their work.<sup>57</sup> But when a telegraph company has constructed its lines within a city under an ordinance requiring them to be taken down within a fixed time, and the city officials have forcibly cut and removed the wires, they will not be enjoined from interfering with the company in replacing its wires, when its rights under the ordinance have expired.<sup>58</sup> And a city, which has granted to a street railway company the right to construct and operate its tracks in the streets, can not enjoin the company from using a particular kind of rail on the ground that it would constitute a nuisance, the city having full power to regulate the manner of constructing the track.<sup>59</sup>

<sup>56</sup> *City of Quincy v. Bull*, 106 W. & E. Co., 95 Md., 232, 52 Atl., Ill., 337; *City of Atlanta v. Gate* 670.

*City G. L. Co.*, 71 Ga., 106; *Walla* <sup>57</sup> *City of Atlanta v. Gate City G. L. Co.*, 71 Ga., 106.

*Walla v. Walla Walla Water Co.*, 172 U. S., 1, 19 Sup. Ct. Rep., 77; <sup>58</sup> *Mutual Union T. Co. v. City of Chicago*, 11 Biss., 539.

*Chesapeake & P. T. Co. v. Mayor*, 89 Md., 689, 43 Atl., 784, 44 Atl., <sup>59</sup> *Waterloo v. Waterloo S. R. Co.*, 1033; *Mayor v. Baltimore County* 71 Iowa, 193, 32 N. W., 329.

## III. MUNICIPAL-AID SUBSCRIPTIONS.

- § 1282. The general doctrine stated; unconstitutional donation enjoined.
1283. Illegal and unauthorized donation enjoined.
1284. Statutory conditions must be complied with; preliminary vote.
1285. Court must determine question of election.
1286. Holding of election not enjoined.
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1288. When injunction refused.
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1290. The same.
1291. Change in nature of railway enterprise ground for injunction.
1292. Subscriptions contingent upon others.
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1294. Injunction against state treasurer.
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§ 1282. **The general doctrine stated; unconstitutional donation enjoined.** A branch of the law of injunctions of modern origin, and one which seems to have been unknown to the English Court of Chancery, is that which pertains to the jurisdiction as exercised in restraint of an improper donation of public funds by municipal corporations, in aid of the construction of railroads and other public or *quasi* public enterprises of a like nature. These donations usually take the form of a subscription to the capital stock of the railroad or other undertaking, or of an absolute donation of public funds or bonds of the municipality in furtherance of the enterprise to which its aid is pledged. But in whatever manner a municipal corporation seeks to divert its funds or its credit from strictly municipal purposes, a careful scrutiny is exercised by the courts over such donations, and municipalities are held to a strict adherence to the power under which the donation or subscription is authorized, and a departure therefrom affords frequent occasion for resort to the extraordinary aid of equity

by injunction.<sup>1</sup> And it may be affirmed as a general and well established rule of universal application, that unless such municipal subscriptions are authorized and sanctioned by a valid and constitutional expression of the legislative will and the legislative power, property owners and taxpayers are entitled to the aid of an injunction to restrain the municipality from such unauthorized diversion of its money or its credit.<sup>2</sup> Indeed, the right of a citizen and taxpayer to maintain an action to enjoin the corporate authorities of a town from issuing its bonds without authority of law may now be regarded as too well established to admit of question.<sup>3</sup> And an injunction will be granted at the suit of citizens and taxpayers, to prevent the issuing of municipal bonds in aid of a subscription to a railway which is made in disregard of the constitution of the state.<sup>4</sup> So municipal authorities will be enjoined from issuing bonds in payment of a subscription to the capital stock of a railway, and from levying and collecting taxes for the payment of such bonds, when a constitutional provision requiring such subscription to be submitted to a vote of the people has been entirely disregarded.<sup>5</sup> And the taxable in-

<sup>1</sup> For a discussion of the principles by which the courts are governed in granting injunctions against taxes levied in furtherance of municipal-aid subscriptions, see Chapter VIII, Subdivision V, Municipal Aid Taxes.

<sup>2</sup> *Allen v. Inhabitants of Jay*, 60 Me., 124; *List v. City of Wheeling*, 7 West Va., 501; *State v. Saline Co. Court*, 51 Mo., 350; *Foster v. Kenosha*, 12 Wis., 616; *Flack v. Hughes*, 67 Ill., 384; *Chestnutwood v. Hood*, 68 Ill., 132; *Supervisors of Livingston Co. v. Weider*, 64 Ill., 427; *Marshall v. Silliman*, 61 Ill., 218; *Campbell v. Paris & D. R. Co.*, 71 Ill., 611; *Supervisors of Jackson Co. v. Brush*, 77 Ill.,

59; *Allison v. Louisville, H. C. & W. R. Co.*, 9 Bush, 247; *Commissioners of Delaware Co. v. McClintock*, 51 Ind., 325; *Gulf R. Co. v. Commissioners of Miami Co.*, 12 Kan., 230; *Curtenius v. Hoyt*, 37 Mich., 583; *McPike v. Pen*, 51 Mo., 63; *Counterman v. Dublin Township*, 38 Ohio St., 515; *Metzger v. Attica & A. R. Co.*, 79 N. Y., 171; *Harrington v. Town of Plainview*, 27 Minn., 224, 6 N. W., 777.

<sup>3</sup> *Chestnutwood v. Hood*, 68 Ill., 132.

<sup>4</sup> *List v. City of Wheeling*, 7 West Va., 501.

<sup>5</sup> *State v. Saline Co. Court*, 51 Mo., 350.

habitants of a town may enjoin the town authorities from issuing or negotiating its bonds in aid of a private enterprise, to which the town has loaned its credit under a statute which is held to be unconstitutional.<sup>6</sup>

§ 1283. **Illegal and unauthorized donation enjoined.** The illustrations of the general doctrine which have been mentioned in the preceding section are cases where the municipal subscription or donation was made in disregard of some constitutional restriction embodied in the organic law of the state. But, although the attempted donation of the municipal funds or municipal credit may contravene no provision of the constitution, yet if it has not the sanction of legislative authority it will be treated as void, and may be enjoined in behalf of a taxpayer seeking the relief.<sup>7</sup> Thus, where a board of county commissioners have voted an issue of county bonds in aid of the construction of a railway, without authority of law, there being no legislation authorizing such appropriation, the issuing of the bonds will be enjoined.<sup>8</sup> So the issuing of township bonds in aid of a railway corporation will be enjoined when the town authorities have no power or legal authority to make such subscription, or to issue the bonds. And in such a case it is sufficient to aver in the bill upon information and belief that the railway company will soon demand of the town supervisor the bonds in question, and that there is danger that the bonds will be issued unless the injunction is granted.<sup>9</sup> So an individual citizen and taxpayer, resident within the township and having property therein subject to taxation, may maintain a bill to enjoin the township officers from issuing railway-aid bonds of the town which are

<sup>6</sup> *Allen v. Inhabitants of Jay*, 60 Me., 124.

<sup>7</sup> *Commissioners of Delaware Co. v. McClintock*, 51 Ind., 325; *Campbell v. Paris & D. R. Co.*, 71 Ill., 611; *Gulf R. Co. v. Commissioners of Miami Co.*, 12 Kan., 230; *Lynch*

*v. Eastern, La F. & M. R. Co.*, 57 Wis., 430, 15 N. W., 743, 825.

<sup>8</sup> *Commissioners of Delaware Co. v. McClintock*, 51 Ind., 325.

<sup>9</sup> *Campbell v. Paris & D. R. Co.*, 71 Ill., 611.

illegal and invalid.<sup>10</sup> Nor is the relief confined to taxpayers and citizens, but it may also be extended in aid of the municipality itself. And where public officers have in their hands funds of a county which they are about to pay over to a railway company in payment of interest upon bonds of the county issued in aid of the railway without authority of law, and which are void in the hands of the holders, equity may enjoin such payment in an action brought by the board of county commissioners for that purpose.<sup>11</sup>

§ 1284. **Statutory conditions must be complied with; preliminary vote.** It is also to be observed that, although there may be a valid and constitutional expression of the legislative will, authorizing a municipality to lend its credit or to donate its funds or obligations in aid of other than municipal enterprises, the courts require a strict adherence to the terms and conditions under which the power is conferred. And when, as is usually the case, the statute conferring the power requires the question of its exercise to be first submitted to a vote of the electors, who are to determine whether the municipality shall lend its aid or issue its obligations in aid of a railway or other enterprise of like nature, a failure to comply with the conditions thus imposed, either by entirely omitting such election, or by a substantial departure from the statute as regards the time and notice of the election, will warrant relief by injunction.<sup>12</sup> A court of equity will there-

<sup>10</sup> *Curtenius v. Hoyt*, 37 Mich., 583.

<sup>11</sup> *Gulf R. Co. v. Commissioners of Miami Co.*, 12 Kan., 230. As to the existence of a defense to municipal-aid bonds, coupled with the risk of losing evidence, and apprehensions of a multiplicity of suits as grounds for enjoining actions upon such bonds, see *Town of Springport v. Teutonia Savings Bank*, 75 N. Y., 397.

<sup>12</sup> *Bronenberg v. Commissioners*

of Madison Co., 41 Ind., 502; *Finey v. Lamb*, 54 Ind., 1; *McPike v. Pen*, 51 Mo., 63; *Wright v. Bishop*, 88 Ill., 302; *Hodgman v. Chicago & St. P. R. Co.*, 20 Minn., 48; *Goedgen v. Supervisors*, 2 Bissell, 328; *Union Pacific R. Co. v. Lincoln Co.*, 3 Dill., 300; *Cook v. City of Beatrice*, 32 Neb., 80, 48 N. W., 828. See also *Jones v. Hurlburt*, 13 Neb., 125. And where a petition of taxpayers is necessary to authorize the issuing of the bonds,

fore entertain jurisdiction in behalf of a taxpayer of a municipality, to restrain it from issuing its bonds in aid of a subscription to a railway company without the necessary vote of the electors authorizing such issue.<sup>13</sup> So when the statute authorizing subscriptions by a city in aid of a railroad provides that the subscription shall not take effect until an ordinance specifying the time, terms and conditions of the bonds to be issued shall be first submitted for approval to a vote of the people, the authority to issue the bonds being dependent upon the vote, a failure to comply with the statute in that regard affords ground for an injunction at the suit of an individual property owner and taxpayer.<sup>14</sup> And a board of county supervisors will be enjoined from issuing bonds of the county in aid of a subscription to a railway, when they have failed to comply with the conditions of the statute as to giving notice and holding an election upon the question of such subscription.<sup>15</sup> So where a statute authorizing the issue of municipal bonds for the construction of public buildings requires the debt thus created to be paid in ten years, but the vote as submitted to the people and adopted is for payment of the bonds in twenty years, such a substantial departure from the requirements of the law will justify relief by injunction against issuing the bonds.<sup>16</sup> So also when a board of county commissioners are authorized by law to issue bonds for such purposes as the erection of public buildings, the interest on such bonds to be paid annually, if they are proceeding to issue the bonds with interest payable semi-annually, their action will be regarded as illegal and void, and

the signing of the petition on Sunday, in violation of a statute prohibiting the doing of business on Sunday, has been held to be sufficient ground for enjoining the delivery of the bonds. *De Forth v. Wisconsin & M. R. Co.*, 52 Wis., 320.

*Kentucky U. R. Co. v. Bourbon County*, 85 Ky., 98, 2 S. W., 687.

<sup>14</sup> *Hodgman v. Chicago & St. P. R. Co.*, 20 Minn., 48.

<sup>15</sup> *Goedgen v. Supervisors*, 2 Bissell, 328.

<sup>16</sup> *Union Pacific R. Co. v. Lincoln Co.*, 3 Dill., 300.

<sup>13</sup> *Wright v. Bishop*, 88 Ill., 302;

may be enjoined at the suit of a citizen and taxpayer.<sup>17</sup> And when the relief is sought upon the ground that the election submitting the question to the popular vote was illegal, it is proper to entertain the application before the issuing of the bonds as well as afterward.<sup>18</sup>

§ 1285. **Court must determine question of election.** Since courts of equity thus interfere by injunction to prevent the issuing of municipal-aid obligations because of non-compliance with the law requiring an election, it follows of necessity that they must extend the jurisdiction to the point of investigating and determining the validity of the election under which the proposed action is had. It is accordingly held, upon a bill by taxpayers to restrain the issuing of county bonds in aid of a subscription to a railway, upon the ground of the illegality of the election under which the bonds are issued, that the court has jurisdiction to investigate and pass upon the validity of such election. In such cases the jurisdiction is exercised, not with a view to contesting the election, but for the purpose of ascertaining whether the contract of subscription has been duly authorized in accordance with law.<sup>19</sup> And the fact that the county commissioners have declared the result of the election to be in favor of the subscription does not oust the jurisdiction of equity, or prevent the court from inquiring into the legality of the election.<sup>20</sup> But the courts will not permit technical objections or mere irregularities to defeat the plainly expressed will of the people in this class of cases. And if there has been a substantial compliance with the statute con-

<sup>17</sup> *English v. Smock*, 34 Ind., 115.

<sup>18</sup> *Winston v. Tennessee & P. R. Co.*, 1 Baxter, 60.

<sup>19</sup> *Winston v. Tennessee & P. R. Co.*, 1 Baxter, 60; *McDowell v. Massachusetts & S. C. Co.*, 96 N. C., 514; *Goforth v. Rutherford R. C. Co.*, 96 N. C., 535, 2 S. E., 361.

<sup>20</sup> *McDowell v. Massachusetts & S. C. Co.*, 96 N. C., 514, 2 S. E., 351;

*Goforth v. Rutherford R. C. Co.*, 96 N. C., 535, 2 S. E., 361. As to the right to restrain county commissioners from canvassing the returns of an election held to authorize a subscription to the capital stock of a railway company in Kansas, see *State v. Commissioners of Wabaunsee Co.*, 36 Kan., 180, 12 Pac., 942.



cerning the manner of holding the election, and if the will of the voters as shown by such election is clearly in favor of the donation, the court will not enjoin the issuing of the bonds upon merely technical or formal grounds, which do not challenge the correctness of the result.<sup>21</sup> Where, however, the statute authorizing the subscription upon the consent of a certain proportion of taxpayers makes the written consent of the taxpayers, verified by affidavit of the town assessors, evidence of the required conditions, a court of equity will not, upon an application for an injunction against the issuing of the bonds, go behind such evidence or examine into the question of whether the requisite consent was actually obtained.<sup>22</sup>

§ 1286. **Holding of election not enjoined.** It is to be borne in mind, however, that the jurisdiction as exercised upon the grounds under discussion does not extend to enjoining the election to determine the question of lending municipal aid, when such election is duly held in accordance with the statute. And where a board of municipal officers are authorized by law to call an election upon the question of voting a subscription in aid of a railway, and the election is called in accordance with the requirements of the statute, a court of equity • has no power to enjoin the holding of such election. And the court having no jurisdiction in such case, its writ of injunction, if granted, will be held absolutely void, and defendants are not guilty of a contempt in refusing to regard or obey it.<sup>23</sup>

§ 1287. **Aliens allowed relief.** The preventive relief which is afforded by courts of equity through the process of injunction against the unauthorized issuing of municipal-aid bonds is not limited to cases where the jurisdiction is invoked for the protection of resident citizens and taxpayers, but is granted as well in behalf of aliens having property subject to municipi-

<sup>21</sup> *Trimmier v. Bomar*, 20 S. C., 354.

<sup>23</sup> *Walton v. Develing*, 61 Ill., 201; *Darst v. The People*, 62 Ill.,

<sup>22</sup> *Pierce v. Wright*, 6 Lans., 306.

pal taxation in payment of such bonds. And in the case of aliens seeking the relief, the jurisdiction may be exercised by the United States circuit court for the given district, when the amount of taxes that would be required of complainants on account of such illegal and unauthorized bonds exceeds the sum of five hundred dollars.<sup>24</sup>

§ 1288. **When injunction refused.** Where railway-aid bonds are subscribed and issued by a municipality under a statute which is not in conflict with the constitution, and the conditions of the act have been complied with and the bonds have been issued and have passed into the hands of *bona fide* holders for value, equity will not enjoin the municipal authorities from raising the necessary funds by taxation for the payment of interest upon such bonds.<sup>25</sup> And when the law authorizing the submission of the question to a popular vote has been complied with in all essential particulars, and the bonds have been voted, a court of equity will not enjoin their issue because certain conditions have been imposed upon the railway company which is to receive the aid, when such conditions are reasonable in themselves and for the manifest interest of the county voting the bonds.<sup>26</sup> Nor will town officers be restrained from issuing bonds of the town in aid of a subscription to a railway company, when it is not positively averred that the defendants are such officers.<sup>27</sup> And a taxpayer who has himself participated in issuing municipal-aid bonds is estopped from enjoining the collection of a tax for their payment.<sup>28</sup>

§ 1289. **When issue or delivery of railway-aid bonds enjoined.** An injunction is the appropriate remedy to prevent the execution and delivery by municipal officers of

<sup>24</sup> Goedgen v. Supervisors, 2 Bissell, 328.

<sup>25</sup> Cumines v. Supervisors, 63 Barb., 287.

<sup>26</sup> Union Pacific R. Co. v. Merrick Co., 3 Dill., 359.

<sup>27</sup> Pierce v. Wright, 6 Lans., 306.

<sup>28</sup> Young v. Campbell, 75 N. Y., 525.

negotiable bonds of the municipality, when it is shown that such officers are about to execute and put the bonds in circulation in disregard of the authority conferred upon them by law, or in violation of the trust reposed in them as municipal officers.<sup>29</sup> In such cases the relief is proper, not only to give effect to the safeguards and restraints imposed by the constitution of the state or by legislative enactments, but also to enforce the terms and conditions prescribed by the voters of the municipality. Thus, where town officers are empowered to issue railway-aid bonds upon such terms and conditions as may be agreed upon between the town and the railway company, and one of the conditions thus imposed is that the bonds shall be delivered upon the construction of the railway track between certain points, but the company, instead of building its own line, adopts and leases the line of another company for a part of the distance, such non-compliance with the required conditions affords ground for enjoining the delivery of the bonds.<sup>30</sup> And when a railway company fails to comply with the conditions upon which municipal bonds have been voted, the right to the bonds being dependent upon such conditions, the delivery of the bonds may be prevented by injunction.<sup>31</sup> So when bonds of a county are voted in aid of a subscription to the capital stock of a railway company, and it is the duty of the county officers to determine as to the performance by the company of the conditions precedent to the delivery of the bonds, but without legal authority such officers place the bonds in the hands of trustees, with directions to deliver them to the railway company when satisfied of the performance of such conditions, the trustees may be restrained from making any disposition of the bonds other than to surrender them back to the proper county authorities.<sup>32</sup>

<sup>29</sup> *Lawson v. Schnellen*, 33 Wis. 288; *City of Madison v. Smith*, 83 Ind., 502.

<sup>30</sup> *Lawson v. Schnellen*, 33 Wis., 288.

<sup>31</sup> *Wagner v. Meety*, 69 Mo., 150.

<sup>32</sup> *Supervisors of Jackson Co. v. Brush*, 77 Ill., 59.

And where the freeholders of a township have been induced by false representations to sign a petition calling for an election for the purpose of voting upon the question of a proposed issue of railway-aid bonds, such false representations are ground for an injunction against the issuing of the bonds.<sup>33</sup>

§ 1290. **The same.** It is also held that where town officers are about to deliver to a railway company the bonds of the town, issued in aid of the railway, and are proceeding in violation of the conditions of subscription, they may be perpetually enjoined on the ground that if the bonds should be negotiated the town might be embarrassed in defending against them at law.<sup>34</sup> And when a petition by a majority of the freeholders of a city is necessary to authorize the city council to make the subscription, if the council act upon and deny the petition, but two years later rescind such action and vote the subscription, the negotiation of the bonds by the city may be enjoined.<sup>35</sup> But a taxpayer of a town which has issued bonds in aid of a railway can not enjoin the transfer or delivery of the bonds to the officers of the company on the ground that they were not legally elected, they being officers *de facto* of the company.<sup>36</sup>

§ 1291. **Change in nature of railway enterprise ground for injunction.** A fundamental change in the nature and character of the enterprise contemplated by a railway company, to which municipal corporations have subscribed and lent their aid, is also treated as sufficient ground for extending relief by injunction, the subscriber to the capital stock being released by such change from the obligation to pay his subscription, when he has not consented to the change. And the procuring of the franchise of another railroad running at right angles with the former, and its construction and opera-

<sup>33</sup> *Wullenwaber v. Dunigan*, 30 Neb., 877, 47 N. W., 420, 13 L. R. A., 811. <sup>35</sup> *City of Madison v. Smith*, 81 Ind., 502.

<sup>36</sup> *Sauerhering v. Iron Ridge R. Co.*, 25 Wis., 447.

<sup>34</sup> *Danville v. Montpelier R. Co.*, 43 Vt., 144.

tion by the former road, are held to constitute such a change as to warrant a court of equity in enjoining the officers of a municipal corporation from completing their subscription and issuing bonds to the railway company.<sup>37</sup> But the fact that the road has been constructed by an assignee of the company to which the aid was voted has been held insufficient to warrant an injunction against the delivery of the bonds.<sup>38</sup>

§ 1292. **Subscriptions contingent upon others.** Upon a bill by citizens and taxpayers to enjoin the authorities of a town from subscribing to the capital stock of a railway company, when the contract of subscription made by the defendant town is by its terms contingent upon like subscriptions being made by other towns, the court will not consider the validity of the subscriptions of such other towns, when it is not shown that the bonds are to be executed or delivered upon any other terms or conditions than as specified in the agreement entered into with the railway company. Nor will the injunction be granted in such case upon the ground that the subscription by the town authorities should precede the vote of the electors upon the issuing of the bonds, when the statute authorizing the subscription does not expressly declare such intent, and when such a construction does not result by necessary implication.<sup>39</sup>

§ 1293. **Distinction between municipal donation and subscription to stock of railway.** In Wisconsin a distinction is taken between cases of municipal subscriptions to the capital stock of railway companies, in aid of which taxes may be properly levied, and municipal donations in aid of railways where the county or municipality does not subscribe to the

<sup>37</sup> *Noesen v. Town of Port Washington*, 37 Wis., 168; *Perkins v. Same*, *Ib.*, 177. As to the right to enjoin municipal officers from making a new contract with a railway company changing in effect the terms of the original subscrip-

tion, without a vote of the citizens, see *Mayor v. Camak*, 75 Ga., 429.

<sup>38</sup> *Lynch v. Eastern, La F. & M. R. Co.*, 57 Wis., 430, 15 N. W., 743, 825.

<sup>39</sup> *Phillips v. Town of Albany*, 28 Wis., 340.

stock, and does not become a part owner of the railway. And while cases of the former class are upheld, the latter, being for a mere donation of municipal aid to a private corporation, are held not to be a legitimate exercise of the taxing power. In conformity with this distinction, therefore, it is held that a court of equity may enjoin municipal officers from issuing the obligations of the municipality to a railway company as a mere donation.<sup>40</sup>

§ 1294. **Injunction against state treasurer.** A citizen and taxpayer may maintain a bill in behalf of himself and all other taxpayers of the state, to enjoin a state treasurer from issuing bonds of the state in aid of a subscription to a railway under an act of the legislature held to be unconstitutional.<sup>41</sup> Where, however, a state treasurer, acting under an unconstitutional law, has appropriated to other purposes funds of the state which have been raised by taxation for the payment of interest upon railroad-aid bonds, a holder of such bonds can not enjoin the treasurer from paying any moneys out of the treasury until he has replaced the amount thus misappropriated.<sup>42</sup>

§ 1295. **Bonds actually issued.** Equity will not entertain a bill for an injunction to restrain the issuing of municipal bonds in aid of a subscription to a railway, when the bonds have been actually issued and delivered to the company, since the proper function of an injunction is to afford only protective relief, and not to correct wrongs or injuries which have already been committed.<sup>43</sup> Where, however, bonds of a municipality have been issued without legal authority in aid of a subscription to the capital stock of a railway company, taxpayers of the municipality, whose property the bonds upon their face purport to bind, are entitled to an injunction

<sup>40</sup> *Whiting v. Sheboygan & Fond du Lac R. Co.*, 25 Wis., 167.

<sup>42</sup> *Self v. Jenkins*, 71 N. C., 578.

<sup>43</sup> *Menard v. Hood*, 68 Ill., 121.

<sup>41</sup> *Galloway v. Jenkins*, 63 N. C., 147.

to prevent the railway company and its officers from selling or otherwise disposing of the bonds.<sup>44</sup>

§ 1296. **Proceeds of tax in hands of official custodian.** It has been held in New York, in the absence of any controlling statute, that a taxpayer can not maintain a bill for an injunction against the official custodian of the proceeds of a municipal tax levied by an official board in payment of an indebtedness against a municipality. Where, therefore, it was sought to enjoin certain railroad commissioners of a town, appointed under an act of legislature, from paying out moneys received by them as the proceeds of a tax levied for the payment of interest upon bonds of the town issued in aid of a railway, the relief was refused, upon the ground that equity has no jurisdiction to control the application of the proceeds of a tax after collection when in the hands of the proper official custodian.<sup>45</sup>

§ 1297. **Parties.** The authorities are somewhat conflicting as to whether, in an action to enjoin the collection of taxes levied in aid of a municipal subscription to a railway, the railway company should be joined as a party defendant. Upon the one hand, it is held that where citizens and taxpayers seek to restrain the collection of municipal taxes levied in aid of such a subscription to capital stock, the railway company and its directors are not proper or necessary parties, and that it is error to admit such directors as parties upon their own petition.<sup>46</sup> Upon the other hand it is held that in an action

<sup>44</sup> *Allison v. Louisville*, H. C. & W. R. Co., 9 Bush, 247.

<sup>45</sup> *Kilbourne v. St. John*, 59 N. Y., 21; *Kilbourne v. Allyn*, 7 Lans., 352. *Kilbourne v. St. John*, 59 N. Y., 21, may be regarded as embodying the result of the New York authorities upon the jurisdiction of equity in restraint of taxation, independent of statute. But by an act of legislature of 1872, provision was made for relief in

such cases, and the jurisdiction of the courts under this act would seem to be enlarged to the extent of warranting relief in equity to restrain the unauthorized issue of municipal bonds under railway-aid subscriptions. See *Ayers v. Lawrence*, 59 N. Y., 192, reversing S. C., 63 Barb., 454; *Hurlburt v. Banks*, 1 Ab. New Cas., 157.

<sup>46</sup> *Jager v. Doherty*, 61 Ind., 528.

to restrain the collection of taxes levied by a county court for the payment of interest upon such bonds, both the county court which made the subscription and levied the tax and the railway company to which the bonds were issued are necessary parties.<sup>47</sup> So it has been held that the bondholders themselves are proper parties to an action of this nature.<sup>48</sup> And upon principle it is difficult to ascertain any satisfactory reason why such bondholders should not be joined as parties defendant, even though the railway company be omitted, since their interests are directly and seriously jeopardized if the relief be granted. And where the bill seeks to have the subscription canceled and the bonds surrendered up, the railway company is a necessary party to the action, as well as an agent of the county by whom the bonds are held for negotiation.<sup>49</sup> So in an action brought by taxpayers to restrain the issuing of bonds by a city in payment for a work of local improvement of a public nature, which is under the control and management of a board of commissioners, the city as such and the board intrusted with the duty of making the improvement are necessary parties.<sup>50</sup>

<sup>47</sup> *State v. Sanderson*, 54 Mo., 203.

<sup>49</sup> *State v. Callaway Co. Court*, 51

<sup>48</sup> *Board v. Texas & P. R. W. Co.*, Mo., 395.

46 Tex., 316.

<sup>50</sup> *Hurlburt v. Banks*, 1 Ab. New Cas., 157.



## IV. PARTIES.

- § 1298. Special injury requisite; taxpayers proper plaintiffs.  
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§ 1298. **Special injury requisite; taxpayers proper plaintiffs.** The question of the degree of interest in the subject-matter which is requisite to render one a proper party plaintiff, to institute an action for the purpose of restraining misconduct on the part of municipal corporations or their officers, is one of much practical importance and deserving of special attention. In general it may be said that to warrant the interference of equity in this class of cases, the aggrieved party must show that some special and peculiar injury, personal to himself, is likely to result from the act complained of, aside from the general injury to the public.<sup>1</sup> And while some conflict of authority exists as to what constitutes such special injury as will warrant a court of equity in interfering, the better doctrine is, that taxpayers of a municipal corporation, as a city or county, whose burdens of taxation are increased by the misappropriations of public funds by municipal officers or by other official misconduct on the part of such officers,

<sup>1</sup> Jones v. Little Rock, 25 Ark., 301; City of Chicago v. Union Building Association, 102 Ill., 379; Seager v. Kankakee Co., 102 Ill., 669; Hesing v. Scott, 107 Ill., 600; Cicero Lumber Co. v. Cicero, 176 Ill., 9, 51 N. E., 758, 42 L. R. A., 696. As to the right of private citizens to enjoin a municipal corporation from carrying out the provisions of an ordinance providing for a supply of water by a foreign corporation, see Dodge v. City of Council Bluffs, 57 Iowa, 560, 10 N. W., 886.

sustain such special damage as to entitle them to relief.<sup>2</sup> Thus, the enforcement of a city ordinance which is unconstitutional and void, and which seeks to impose a debt upon the city, may be enjoined by property owners and taxpayers of the city.<sup>3</sup> So where a board of county commissioners are proceeding without authority of law to appropriate county funds in aid of the construction of a railway, a taxpayer of the county has such an interest in the public funds as enables him to maintain a bill for an injunction.<sup>4</sup> And a taxpayer is entitled

<sup>2</sup> *Mayor v. Gill*, 31 Md., 375; *Peter v. Prettyman*, 62 Md., 566; *Harney v. Indianapolis R. Co.*, 32 Ind., 244; *Warren Co. Agricultural Joint Stock Company v. Barr*, 55 Ind., 30; *Rothrock v. Carr*, 55 Ind., 334; *Hodgman v. Chicago & St. P. R. Co.*, 20 Minn., 48; *Sinclair v. Commissioners of Winona Co.*, 23 Minn., 404; *Hamilton v. Village of Detroit*, 85 Minn., 83, 88 N. W., 419; *City of Springfield v. Edwards*, 84 Ill., 626; *Winston v. Tennessee & P. R. Co.*, 1 Baxter, 60; *Matthis v. Town of Cameron*, 62 Mo., 504; *Pittsburg's Appeal*, 79 Pa. St., 317; *Dent v. Cook*, 45 Ga., 323; *Wagner v. Meety*, 69 Mo., 150; *Willard v. Comstock*, 58 Wis., 565, 17 N. W., 401; *Kyes v. St. Croix County*, 108 Wis., 136, 83 N. W., 637; *Mueller v. Eau Claire County*, 108 Wis., 304, 84 N. W., 430; *Siegel v. Town of Liberty*, 111 Wis., 470, 87 N. W., 487; *Kircher v. Pederson*, 117 Wis., 68, 93 N. W., 813; *Davenport v. Kleinschmidt*, 6 Mont., 502, 13 Pac., 249; *Solomon v. Fleming*, 34 Neb., 40, 51 N. W., 304; *Brownfield v. Houser*, 30 Ore., 534, 49 Pac., 843. But see, *contra*, *Craft v. Jackson Co.*, 5 Kan., 518; *Baldwin v. Wilbraham*, 140 Mass., 459, 4 N. E.,

829; *Steele v. Municipal Signal Co.*, 160 Mass., 36, 35 N. E., 105. And see *Brownfield v. Houser* and *Kircher v. Pederson*, *supra*, as to the distinction between the right of a taxpayer before and after public funds have been misapplied.

<sup>3</sup> *Mayor v. Gill*, 31 Md., 375.

<sup>4</sup> *Harney v. Indianapolis R. Co.*, 32 Ind., 244. *Frazer, C. J.*, delivering the opinion, says: "But it is contended that a tax payer has no such interest in the funds belonging to the county treasury as will enable him to maintain a suit to prevent unlawful appropriations thereof. We can not regard this question as open for further discussion in this court. It has been a common remedy in this state, and has been sanctioned by repeated judgments here. *Lafayette v. Cox*, 5 Ind., 38; *Oliver v. Keightley*, 24 Ind., 514. It has been sanctioned elsewhere. *New London v. Brainard*, 22 Conn., 552. It is sanctioned by established principles, acted upon and recognized everywhere. The citizen may not be able to protect himself in any other way. If this is not his remedy, he has none. The money drawn from him by taxation may be squandered by unlawful dona-

to relief against the illegal and unauthorized diversion of public funds irrespective of the amount of the taxes paid by him,<sup>5</sup> and regardless of whether his individual loss will be great or small, it being regarded as sufficient to warrant the granting of the writ that the burden of his taxation will be unjustly and unlawfully increased.<sup>6</sup> And since the municipal government of a city or town is intrusted with the control and disposition of municipal affairs for the benefit and protection of its citizens and taxpayers, they are proper parties to a bill for an injunction against the improper exercise of municipal authority.<sup>7</sup>

§ 1299. **The rule illustrated.** In conformity with and in illustration of the general doctrine thus stated, it is held that any taxpayer of a county has sufficient interest in the subject-matter involved to constitute him a proper party to institute an action to enjoin the issuing of county bonds in aid of an illegal subscription to a railway company, and to restrain the assessment and collection of taxes with which to pay the principal and interest of such bonds.<sup>8</sup> So a taxpayer of a county may enjoin an illegal appropriation of the county funds by a board of commissioners to a private corporation.<sup>9</sup> And citizens and taxpayers of a county may in like manner

tions to forward all manner of visionary schemes; other contributions may be wrung from him from year to year, and wasted in the same way, in defiance of laws carefully framed for his protection, and he would nevertheless be helpless. A more proper case for injunction can not be well conceived than that in which a taxpayer seeks to protect from lawless waste a public fund, which, when dissipated thus, the law will with strong hand compel him to replenish. See *Gifford v. N. J. R. Co.*, 2 Stockt., 171."

<sup>5</sup> *City of Chicago v. Nichols*, 177 Ill., 97, 62 N. E., 359; *Frederick v. Douglas County*, 96 Wis., 411, 71 N. W., 798.

<sup>6</sup> *Mueller v. Eau Claire County*, 108 Wis., 304, 84 N. W., 430.

<sup>7</sup> *Milbau v. Sharp*, 15 Barb., 193; *Stuyvesant v. Pearsall*, Ib., 244; *Christopher v. Mayor*, 13 Barb., 567.

<sup>8</sup> *Winston v. Tennessee & P. R. Co.*, 1 Baxter, 60.

<sup>9</sup> *Warren Co. Agricultural Joint Stock Company v. Barr*, 55 Ind., 30.

enjoin an illegal and unauthorized donation of funds by a board of county commissioners in aid of the erection of a school house.<sup>10</sup> So citizens and taxpayers of a county may enjoin, until a final hearing upon the merits, the payment of county bonds alleged to have been issued without legal authority in aid of the building of a jail.<sup>11</sup>

§ 1300. **Further illustrations.** As still further illustrating the general doctrine that taxpayers of a municipal corporation are proper parties to invoke the preventive aid of equity in restraint of illegal action on the part of the municipality or its officers, it is held that a citizen and taxpayer has such an interest in the subject-matter as to entitle him to an injunction to prevent the authorities of a municipal corporation from incurring indebtedness in excess of the maximum fixed by the constitution of the state as the limit beyond which municipal indebtedness shall not be incurred.<sup>12</sup> So a taxpayer of a municipal corporation is a proper party complainant to a bill for an injunction against the municipality to prevent the payment of a judgment alleged to be void, when such payment would result in increasing the burdens of municipal taxation.<sup>13</sup> And when a municipal corporation, acting in excess of its authority and power, is proceeding to carry into execution the terms of an ordinance for the annexation of contiguous territory to the municipality, a citizen and taxpayer, whose taxes would be increased by the proposed action, may maintain a bill for relief by injunction.<sup>14</sup> And where relief is sought to restrain the removal of a county seat to a certain city, the action may be maintained by a taxpayer and property owner of such city, although he is not a resident thereof, but resides in the city from which the removal is to be made.<sup>15</sup>

<sup>10</sup> *Rothrock v. Carr*, 55 Ind., 334.

<sup>11</sup> *Dent v. Cook*, 45 Ga., 323.

<sup>12</sup> *City of Springfield v. Edwards*, 84 Ill., 626.

<sup>13</sup> *Matthis v. Town of Cameron*, 62 Mo., 504.

<sup>14</sup> *Pittsburg's Appeal*, 79 Pa. St., 317.

<sup>15</sup> *Brockman v. City of Creston*, 79 Iowa, 587, 44 N. W., 822.

And where a taxpayer seeks relief, his motive in bringing the action and the value of his property are immaterial in determining his right to an injunction.<sup>16</sup>

§ 1301. **Limitations upon right of taxpayers to relief.** Although the general doctrine that taxpayers are proper parties to invoke equitable relief against misconduct upon the part of municipal authorities is thus seen to be well established, it is not to be understood that they are entitled to maintain an action in all cases of this nature, regardless of their personal interest, or of the degree of injury which they may sustain. And where, under a general power in a city charter to establish and regulate markets, the corporate authorities of the city are about to remove a market house, taxpayers, as such, have no sufficient ground for enjoining the removal, whatever may be the rights of adjacent proprietors and others injuriously affected thereby.<sup>17</sup> So a taxpayer in a city, who files a bill in behalf of himself and other taxpayers to enjoin the city from selling a public park or square, is not entitled to the relief when he has no land abutting upon the square, and when he has no private interest involved other than or different from the body of taxpayers.<sup>18</sup> So private citizens or property owners, whose property is located upon a public street at a considerable distance from a point where it is proposed to vacate or close the street, and who will sustain no special injury by reason of such action, different from that sustained by the public at large, are not entitled to relief by injunction.<sup>19</sup> And equity will not, at the suit of private citizens and taxpayers sustaining no special injury, restrain municipal officers from issuing a dram-shop license without a peti-

<sup>16</sup> *Brockman v. City of Creston*, 79 Iowa, 587, 44 N. W., 822.

<sup>17</sup> *Gall v. Cincinnati*, 18 Ohio St., 563.

<sup>18</sup> *Tift v. City of Buffalo*, 65 Barb., 460.

<sup>19</sup> *City of Chicago v. Union Building Association*, 102 Ill., 379; *Hesing v. Scott*, 107 Ill., 600; *McGee's Appeal*, 114 Pa. St., 470, 8 Atl., 237. And see, *ante*, §§ 594, 757.

tion of a majority of the voters as required by law.<sup>20</sup> And an injunction will not lie against the maintenance of a dispensary by the authorities of a town as being in excess of their charter powers, where its operation would be without possible cost to the town and consequently would result in no injury to the taxpayer.<sup>21</sup> Nor can a taxpayer restrain the issuing of illegal municipal bonds where it appears that resort will not have to be had to taxation to provide for their payment, since in such case he suffers no injury.<sup>22</sup>

§ 1302. **Taxpayer must sue in good faith.** The general rule, as stated in the preceding sections, is also to be understood as limited to cases where the action is instituted by the taxpayer in good faith, and for the protection of his own interest. And where a taxpayer seeks to restrain an alleged waste or injury to the property of a city, equity will not extend him relief when it is shown that the action is not brought in good faith for the protection of his own interest, but that he is merely a colorable plaintiff, suing in behalf of other parties in interest.<sup>23</sup>

§ 1303. **Information by attorney-general.** Where the injury which it is sought to enjoin is of a public nature, relief is sometimes sought by an action instituted in the name of the attorney-general. And where under an act of parliament lands are directed to be placed and kept in proper condition for purposes of public recreation, the municipal authorities having charge of such lands may be enjoined from diverting them to another and different use without authority of law, upon an information filed by the attorney-general.<sup>24</sup> Where, however, a tax has been voted, levied and paid by the electors of a township for the purchase of land to be used as a public

<sup>20</sup> *Seager v. Kankakee Co.*, 102 Ill., 669.

<sup>21</sup> *Blanton v. Merry*, 116 Ga., 288, 42 S. E., 211.

<sup>22</sup> *Fellows v. Walker*, 39 Fed., 651.

<sup>23</sup> *Hull v. Ely*, 2 Abb. New Cas., 440.

<sup>24</sup> *Attorney-General v. Mayor*, 1 Gif., 363.

common, without objection from any source, and the land has been conveyed to the township upon the faith of such proceedings, and a portion of the purchase money has been paid there being no abuse of corporate authority and no excess of power shown, equity will not enjoin the payment of the residue of the purchase money upon an information filed by the attorney-general at the relation of a citizen.<sup>25</sup>

§ 1304. **The same.** In New York it is held that where the act of a municipal corporation which it is sought to enjoin injuriously affects the public at large or the entire community over which the corporate jurisdiction extends, the attorney-general is a necessary party to the prosecution of the action, as in a case where it is sought to restrain the authorities of a city from granting a franchise to lay a street railway, the relief being sought upon the ground of excess of power and breach of trust.<sup>26</sup> And in Missouri it is held that the state may, through its public prosecutor, maintain a bill for an injunction against the authorities of a municipal corporation to prevent a subscription to the capital stock of a railway company, when such authorities are proceeding in violation of the constitution and laws of the state. And a distinction is drawn between a proceeding by injunction against a public corporation in such case, and a proceeding against a private corporation where *quo warranto* affords ample remedy for an abuse or misuser of the corporate franchises. Indeed, the doctrine is asserted in broad and general terms, that the state may, through its public prosecutor, maintain a bill to enjoin public

<sup>25</sup> Attorney-General *v.* Burrell, 31 Mich., 25.

<sup>26</sup> Davis *v.* Mayor, 2 Duer, 663. And see this case for a full discussion of the English and American cases upon the power to institute the proceedings in behalf of the public or by the attorney-general. But see *People v. Lowber*, 7 Ab.

Pr., 158, where it is said that, if it be conceded that the attorney-general may bring an action in the name of the people to enjoin a municipal corporation, it can only be allowed for the purpose of preventing a fraudulent and illegal disposition of the corporate property.

or municipal corporations from acting in violation of the constitution and laws of the state.<sup>27</sup> In New York, however, it is held that the attorney-general can not maintain an action to restrain commissioners appointed under an act of legislature from issuing the bonds of a town, authorized by such act, in payment of the stock of a railway company.<sup>28</sup>

§ 1305. **Joinder of taxpayers as plaintiffs.** As regards the joinder of different taxpayers as parties complainant in an action to enjoin municipal officers from the commission of a threatened act, it is held that two or more taxpayers, having no unity of interest except such as is common to all taxpayers of the municipality, can not unite in maintaining such action, their property being owned in severalty and their interests being separate and distinct.<sup>29</sup>

§ 1306. **Injunction against receipt of municipal warrants.** An injunction will not issue to prevent a municipal corporation from the performance of its duties, upon the application of a person without interest in the subject-matter; and if, in such a case, the municipality acquiesces in a proceeding for an injunction, the persons interested in the performance of the duty which it is sought to enjoin may raise the objection of want of interest in the complainants. Where, therefore, a city is required by law to receive in payment of licenses and taxes certain municipal warrants which it has issued, a creditor and taxpayer of the city has no such interest as to entitle him to an injunction to prevent the city from receiving such warrants; and the holders of the warrants in such case, being the real parties in interest, may object to the granting of the relief.<sup>30</sup>

<sup>27</sup> *State v. Saline Co. Court*, 51 Mo., 350; *State v. Hager*, 91 Mo., 452. And see *State v. Saline Co. Court*, 51 Mo., 350, for a full discussion of the English and American cases upon the right of the attorney-general to maintain such

an action. See also *State v. Cal-laway County Court*, 51 Mo., 395.

<sup>28</sup> *People v. Miner*, 2 Lansing, 396.

<sup>29</sup> *Wood v. Bangs*, 1 Dakota, 179.

<sup>30</sup> *Louisiana National Bank v. City of New Orleans*, 27 La. An., 446.



§ 1307. **Injunction against payment of salaries.** Upon a bill in equity against the clerk, auditor and treasurer of a city to enjoin the payment of salaries to police officers, upon the ground that they were not legally appointed, the city itself is a necessary party, and it is error to grant a perpetual injunction in such a case without joining the city as a party to the action.<sup>31</sup>

<sup>31</sup> *Samis v. King*, 40 Conn., 298.

## CHAPTER XXII.

### OF INJUNCTIONS AGAINST PUBLIC OFFICERS.

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- 1324. Alterations in stream; public improvements.
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- 1326. Executive and state officers, when enjoined; illustrations; excluding plaintiff from use of mails.
- 1327. Acting under unconstitutional law.
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- 1329. Board of medical examiners.
- 1329a. Federal court may enjoin state officials from acting under unconstitutional state statute; irreparable injury must be shown.

§ 1308. **The general doctrine stated.** The preventive jurisdiction of equity extends to the acts of public officers, and will be exercised in behalf of private citizens who sustain such injury at the hands of those claiming to act for the public as is not susceptible of reparation in the ordinary course of

proceedings at law. And it may be stated as a general rule, that when public officers, under color and claim of right, are proceeding to impair either public or private rights, or when their proceedings will result in serious injury to private citizens, without any corresponding benefit to the public, or when the aid of equity is necessary to prevent a multiplicity of suits an injunction will be allowed.<sup>1</sup> Thus, commissioners acting under color of law, and proceeding without any real legal authority to permanently appropriate the land of a private citizen to a purpose connected with a work of internal improvement, may be enjoined from proceeding with such appropriation. And in such a case it is no answer to say that the land, independent of the use to which it is to be put in making the improvement, would be of little value, or that the injury to the owner would be trivial by allowing the work to proceed.<sup>2</sup> So where commissioners of highways are about to remove plaintiff's house as encroaching upon a public highway, their acts will be enjoined where the house does not in fact so encroach.<sup>3</sup> And where penitentiary commissioners have made a contract with the plaintiff for the hiring out of state convicts, and afterwards these officials and the successors of those whose terms have expired adopt a resolution abrogating the contract without legal excuse, relief is properly granted restraining them from refusing to be bound by the contract.<sup>4</sup>

§ 1309. **Relief allowed where authority exceeded.** In applications for relief by injunction against the acts of public officers the determining point is, ordinarily, whether they are acting within the scope of their authority, or whether they are

<sup>1</sup> *Green v. Green*, 34 Ill., 320; 139; *Morehead v. Little Miami R. Mohawk & H. R. Co. v. Artcher*, 6 Co., 17 Ohio, 340; *Anderson v. Paige*, 83; *Oakley v. Trustees*, Ib., Commissioners, 12 Ohio St., 635. 262. And see *Green v. Oakes*, 17 Ill., 249, and cases cited; *Blanton v. Southern F. Co.*, 77 Va., 335.

<sup>2</sup> *Flood v. Van Wormer*, 147 N. Y., 284, 41 N. E., 569.

<sup>4</sup> *McConnell v. Arkansas B. & M.*

<sup>2</sup> *McArthur v. Kelley*, 5 Ohio, Co., 70 Ark., 568, 69 S. W., 559.

transcending that authority. And while equity will not interfere while such officers are acting within the authority conferred upon them by law, to determine whether their action is good or bad, yet if they assume powers over property which do not belong to them, and infringe upon or violate the rights of citizens under pretense of such assumed authority, equity has jurisdiction to interfere for the protection of the citizen. Where, therefore, commissioners of drainage appointed under an act of parliament are acting in excess of their authority, to the injury of private rights, equity may interpose by injunction.<sup>5</sup> And it has been held that where such commissioners, although acting within the scope of their authority, conduct their works in so negligent and expensive a manner that an action for negligence would lie by the proprietors against the commissioners, equity may grant an injunction.<sup>6</sup> And where a statute confers upon a board of pilot commissioners the authority to revoke a pilot's license under certain circumstances, they will be enjoined from revoking such a license where their action is based upon grounds not provided for by the statute.<sup>7</sup>

§ 1310. **Violation of plain official duty ground for relief.** When a plain, official duty, requiring the exercise of no discretion, is incumbent and obligatory upon a state officer, he may be enjoined from acting in violation of such duty by one who will thereby sustain a personal injury for which adequate compensation can not be had at law. And the relief by injunction, in such a case, is regarded as correlative to that by *mandamus* when sought to compel the performance of an official

<sup>5</sup> *Foster v. Hornsby*, 2 Ir. Ch., 426.

<sup>6</sup> *Stubber v. Hornsby*, 2 Ir. Ch., 449.

<sup>7</sup> *Morris v. Board of Pilot Commissioners*, 7 Del. Ch., 136, 30 Atl., 667. And under the statute of Delaware creating the levy court and giving it power to "correct and add to the assessments returned"

and to make "additions to and corrections of the assessment list," it is held that the officials have no power to strike the names of taxpayers from such lists and an injunction is properly granted to restrain them from so doing. *Biggs v. Buckingham*, 6 Del. Ch., 267, 23 Atl., 858.

duty, as to which no element of discretion exists. Thus, where a board of state officers are appointed by law to fund the debt of the state in new bonds to be issued to creditors upon condition of their reducing their demands forty per cent., and accepting sixty per cent. in the new bonds in satisfaction of their claims against the state, a creditor who has thus reduced his demand and accepted the new bonds is entitled to the aid of an injunction, to restrain such board from violating their duty by issuing to a creditor the new bonds in full for his debt without reduction.<sup>8</sup>

§ 1311. **Action of official boards not reviewed in equity.** It is important to observe that courts of equity do not interfere by injunction for the purpose of controlling the action of public officers constituting inferior *quasi* judicial tribunals, such as boards of supervisors, commissioners of highways, and the like, on matters properly pertaining to their jurisdiction, nor will they review and correct errors in the proceedings of such officers, the proper remedy, if any, being at law, by writ of *certiorari*.<sup>9</sup> So where commissioners of roads and highways are by law intrusted with full jurisdiction over matters pertaining to changes in the roads, a court of equity will not interfere with the exercise of their discretion, unless a strong

<sup>8</sup> Board of Liquidation v. McComb, 2 Otto, 531.

<sup>9</sup> Mooers v. Smedley, 6 Johns. Ch., 28; Mayor v. Meserole, 26 Wend., 132, reversing S. C., 8 Paige, 198; Van Doren v. Mayor, 9 Paige, 388; Livingston v. Hollenbeck, 4 Barb., 10; Bouton v. Brooklyn, 15 Barb., 375; Gillespie v. Broas, 23 Barb., 370; Hyatt v. Bates, 40 N. Y., 164; McBride v. Newlin, 129 Cal., 36, 61 Pac., 577. In Mooers v. Smedley, 6 Johns. Ch., 28, Kent, Chancellor, observes: "I can not find by any statute, or precedent, or practice, that it be-

longs to the jurisdiction of chancery, as a court of equity, to review or control the determination of the supervisors in their examination and allowance of accounts and causing the money to be raised; \* \* \* the review and correction of all errors, mistakes and abuses in the exercise of the powers of subordinate public jurisdictions and in the official acts of public officers, belongs to the supreme court. \* \* \* It has always been a matter of legal and never a matter of equitable cognizance."

case of fraud or irreparable injury is shown. And where they have exercised their discretion and made their decision in good faith, and without any intention of oppressing or injuring private persons, an injunction will not be allowed against their action.<sup>10</sup> But a ministerial officer, whose rights and powers are conferred by statute upon certain conditions, may be enjoined from acting contrary to authority, if his acts are likely to result in public injury, such a case being distinguishable from that of a municipal corporation exercising legislative functions or discretionary powers.<sup>11</sup>

§ 1312. **Title to office not determined in equity.** No principle of the law of injunctions, and perhaps no doctrine of equity jurisprudence is more definitely fixed or more clearly established than that courts of equity will not interfere by injunction to determine questions concerning the appointment or election of public officers or their title to office, such questions being of a purely legal nature, and cognizable only by courts of law. A court of equity will not permit itself to be made the forum for determining disputed questions of title to public offices, or for the trial of contested elections, but will in all such cases leave the claimant of the office to pursue the statutory remedy, if there be such, or the common law remedy by proceedings in the nature of a *quo warranto*.<sup>12</sup> Thus, equity

<sup>10</sup> Warfel v. Cochran 34 Pa. St., 381.

<sup>11</sup> Lane v. Schomp, 5 C. E. Green, 82.

<sup>12</sup> People v. Draper, 24 Barb., 265; S. C., 4 Ab. Pr., 322, 14 How. Pr., 233; *In re Sawyer*, 124 U. S., 200, 8 Sup. Ct. Rep., 482; White v. Berry, 171 U. S., 366, 18 Sup. Ct. Rep., 917, reversing S. C., 83 Fed., 578; Green v. Mills, 16 C. C. A., 516, 69 Fed., 852, 30 L. R. A., 90; Taylor v. Kercheval, 82 Fed., 497; Carr v. Gordon, 82 Fed., 373; Dudley v. James, 83 Fed., 345; Flem-

ming v. Stahl, 83 Fed., 940; Couper v. Smyth, 84 Fed., 757; Colton v. Price, 50 Ala., 424; Beebe v. Robinson, 52 Ala., 66, overruling Bruner v. Bryan, 50 Ala., 522; Moulton v. Reid, 54 Ala., 320, reversing S. C. *sub nom.* Reid v. Moulton, 51 Ala., 255; Willeford v. State, 43 Ark., 62; Tappan v. Gray, 9 Paige, 507, affirmed 7 Hill, 259; People v. District Court of Lake County, 29 Col., 277, 68 Pac., 224, 93 Am. St. Rep., 61; Coleman v. Glenn, 103 Ga., 458, 30 S. E., 297, 68 Am. St. Rep., 108; Delahanty v. War-

will not interfere by injunction to restrain persons from exercising the functions of public offices, on the ground of the illegality of the law under which their appointments were made, but will leave that question to be determined by a legal

ner, 75 Ill., 185; *Sheridan v. Colvin*, 78 Ill., 237; *Dickey v. Reed*, 78 Ill., 261; *Burgess v. Davis*, 138 Ill., 578, 28 N. E., 817; *Heffran v. Hutchins*, 160 Ill., 550, 43 N. E., 709, 52 Am. St. Rep., 353; *Marshall v. Illinois State Reformatory*, 201 Ill., 9, 66 N. E., 314; *People v. Barrett*, 203 Ill., 99, 67 N. E., 742; *Muhler v. Hedekin*, 119 Ind., 481, 20 N. E., 700; *Neeland v. State*, 39 Kan., 154, 18 Pac., 165; *Planters Company Association v. Hanes*, 52 Miss., 469; *Ex parte Wimberly*, 57 Miss., 437; *Neiser v. Thomas*, 99 Mo., 224, 12 S. W., 725; *State v. Aloe*, 152 Mo., 466, 54 S. W., 494, 47 L. R. A., 393; *State v. Withrow*, 154 Mo., 397, 55 S. W., 460; *Arnold v. Henry*, 155 Mo., 48, 55 S. W., 1089, 78 Am. St. Rep., 556; *State v. Mayor of Kearney*, 28 Neb., 103, 44 N. W., 90; *Cox v. Moores*, 55 Neb., 34, 75 N. W., 35; *Patterson v. Hubbs*, 65 N. C., 119; *Jones v. Commissioners of Granville*, 77 N. C., 280; *Reemelin v. Mosby*, 47 Ohio St., 570, 26 N. E., 717; *Harding v. Eichinger*, 57 Ohio St., 371, 49 N. E., 306; *Gilroy's Appeal*, 100 Pa. St., 5; *Goldsworthy v. Boyle*, 175 Pa. St., 246, 34 Atl., 630; *Brower v. Kantner*, 190 Pa. St., 182, 43 Atl., 7; *Graeff v. Felix*, 200 Pa. St., 137, 49 Am. St. Rep., 758; *Baker v. Mitchell*, 105 Tenn., 610, 59 S. W., 137; *McAllen v. Rhodes*, 65 Tex., 348; *Kilpatrick v. Smith*, 77 Va., 347; *Mullen v. City of Tacoma*, 16 Wash., 82, 47 Pac., 215; *Huels v. Hahn*, 75 Wis., 468, 44 N. W., 507. See also *State v. Duffel*, 32 La. An., 649. But see *Kerr v. Trego*, 47 Pa. St., 292, where it was held that a preliminary injunction was proper when two different bodies were claiming to act as the common council of a city, upon the ground that the acts in question were contrary to law and prejudicial to the interests of the public, and because no adequate remedy could be had at law. And see, *contra*, *Lawrence v. Ingersoll*, 88 Tenn., 52, 12 S. W., 422, 6 L. R. A., 308, 17 Am. St. Rep., 870; *Armitage v. Fisher*, 26 N. Y. Supp., 364. This last case is cited with approval in *Stahlbut v. Bauer*, 51 Neb., 64, 70 N. W., 496, in which the court intimate that the mayor of a city may enjoin the members of a city council who are proceeding without authority of law to remove him from office, although, apparently, they finally base their decision upon the fact that the defendants failed in the lower court to raise any objection to the jurisdiction of the court. In England, under the provisions of the Judicature Act of 1873, section 25, subsection 8, it has been held that injunctions may be granted to restrain the improper removal from public office of an incumbent thereof. *Aslatt v. Mayor*, 50 L. J. N. S. Ch., 31; *Richardson v. Methley School Board*, 62 L. J. N. S. Ch., 943.

forum. And a temporary injunction granted *pendente lite*, and until the question of the validity of the law under which defendants claim their offices can be determined, will be dissolved.<sup>13</sup> So it is held that a court of chancery has no jurisdiction to restrain an official board of canvassers from canvassing the returns of an election.<sup>14</sup> And when a special tribunal is created by law for determining contested elections, its jurisdiction over such matters is conclusive, and a court of equity has no power to enjoin proceedings before such tribunal; and such an injunction is treated as absolutely void and it may be disregarded without incurring a contempt of court.<sup>15</sup> So where a specific remedy by *quo warranto* exists

<sup>13</sup> *People v. Draper*, 24 Barb., 265; S. C., 4 Ab. Pr., 322, 14 How. Pr., 233. This was an action brought by the attorney-general in behalf of the people, to determine the right of defendants to the offices of police commissioners of the city of New York, plaintiff relying on the invalidity of the law under which defendants derived their appointment. A temporary injunction having been granted restraining the defendants, *pendente lite*, from exercising any of the functions of their offices, it was dissolved on the ground that the case was not one demanding equitable relief. Peabody, J., says: "I am inclined to think that such relief has not been deemed consistent with the interest of the state, with enlightened public policy, or with the general principles which must govern as to an office emanating from the sovereign power, and that hence it has never been adopted in practice; that the public welfare has been deemed to require that an actual incumbent of an office should not be forbidden to perform

the duties of it for the time being, even though his title to the office were doubtful; that the public should not be deprived of the benefit of an office merely because it was uncertain whether the person in and ready to perform the duties of it were there rightfully, even while the title of the party assuming to act should be in controversy. To restrain the action of the incumbent is to restrain all the functions of the office; for he being in—even if wrongfully—no one else can enter until he is removed, and he must act, or no one can. And it is not at all difficult to see that in very many and most cases, the public interest would require that the duties of an office should not be suspended, and its functions cease, until the matter of personal right between rival claimants could be determined."

<sup>14</sup> *Willeford v. State*, 43 Ark., 62; *Dickey v. Reed*, 78 Ill., 261; *People v. Barrett*, 203 Ill., 99, 67 N. E., 742.

<sup>15</sup> *Ex parte Wimberly*, 57 Miss., 437. See also *Dickey v. Reed*, 78 Ill., 261. And see, *post*, § 1425.



at law for the unlawful usurpation of an office by one not entitled thereto, a court of equity will not entertain jurisdiction of the offense, and will not grant an injunction against the incumbent of the office.<sup>16</sup> Especially will the court refuse to interfere where the answer fully denies the equity of the bill, and shows satisfactorily that defendant has a legal right to the office in question.<sup>17</sup> Nor will the right to an office in an incorporated company be tried upon an application for an injunction; nor will one who has been wrongfully removed from such an office be restored by injunction.<sup>18</sup>

§ 1313. **The doctrine illustrated.** In conformity with the general doctrine as above stated, it is held that one who has been duly appointed and commissioned to fill a vacancy in a public office will not be restrained from entering upon the discharge of his duties upon the application of another claimant to the office, but such claimant will be left to pursue his legal remedy.<sup>19</sup> Nor will a court of equity entertain a bill by a former incumbent of a public office, claiming to be re-elected, to enjoin his opponent from using his certificate of election, or from qualifying and entering upon the discharge of his duties, even though gross frauds in the election are alleged by the bill.<sup>20</sup> Nor will equity interfere by injunction to prevent the claimant of an office from receiving his certificate of election upon the alleged ground that he does not possess the necessary qualifications required by law.<sup>21</sup> And

<sup>16</sup> *Hagner v. Heyberger*, 7 Watts & S., 104; *Updegraff v. Crans*, 47 Pa. St., 103. It is to be observed that the equity powers of the courts in the State of Pennsylvania are defined by statute as extending to the prevention of acts contrary to law.

<sup>17</sup> *Maryland v. Jarrett*, 17 Md., 309.

<sup>18</sup> *Sherman v. Clark*, 4 Nev., 138. And see, *ante*, § 1235.

<sup>19</sup> *Beebe v. Robinson*, 52 Ala., 66, overruling *Bruner v. Bryan*, 50 Ala., 522. The court say, p. 73: "We can hardly conceive a more improper use of the extraordinary writ of injunction."

<sup>20</sup> *Moulton v. Reid*, 54 Ala., 320, reversing S. C., *sub nom.* *Reid v. Moulton*, 51 Ala., 255.

<sup>21</sup> *Neiser v. Thomas*, 99 Mo., 224, 12 S. W., 725.

where the authorities of a city have removed from his office a superintendent of streets, he can not maintain a bill to enjoin them from appointing a successor and from interfering with plaintiff in the discharge of his duties, the appropriate remedy in such case being by proceedings in *quo warranto*.<sup>22</sup> So in a proceeding in the nature of *quo warranto* to determine the title of defendants to certain public offices, such as mayor and aldermen of a city, it is not sufficient ground for restraining defendants from exercising their official functions to allege that they were not regularly or properly elected.<sup>23</sup> Nor will equity enjoin the mayor of a city or the members of a city council from proceeding under an ordinance to remove a city official from office and declare his office vacant upon charges of misconduct and malfeasance in office, the proper remedy being at law by *quo warranto*.<sup>24</sup> So an injunction will not lie to restrain the mayor of a city from removing the chief of the fire department from office upon the alleged ground that such removal is illegal.<sup>25</sup> Nor will equity interfere by injunction to prevent a county treasurer from paying a judge's salary for the alleged reason that the judge has vacated his office by accepting another public office.<sup>26</sup> So equity is without jurisdiction to restrain a government official such as a postmaster or United States marshal from removing from office an assistant postmaster or deputy marshal or other subordinate for alleged political reasons and in violation of the civil service laws, such matters being outside the province of a court of equity.<sup>27</sup>

<sup>22</sup> *Delahanty v. Warner*, 75 Ill., 185. 550, 43 N. E., 709, 52 Am. St. Rep., 353.

<sup>23</sup> *State v. Wolfenden*, 74 N. C., 103. <sup>26</sup> *Burgess v. Davis*, 138 Ill., 578, 28 N. E., 817.

<sup>24</sup> *In re Sawyer*, 124 U. S., 200, 8 Sup. Ct. Rep., 482; *Muhler v. Hedekin*, 119 Ind., 481, 20 N. E., 700. <sup>27</sup> *White v. Berry*, 171 U. S., 366, 18 Sup. Ct. Rep., 917; *Taylor v. Kercheval*, 82 Fed., 497; *Carr v. Gordon*, 82 Fed., 373; *Dudley v. James*, 83 Fed., 345; *Fleming v.*

<sup>25</sup> *Heffran v. Hutchins*, 160 Ill.,

§ 1314. **Fees and emoluments of office; insolvency no ground for relief.** The general principle as above stated and illustrated, denying relief in equity for the purpose of determining disputed questions of title to public offices, is also applied to cases where it is sought by injunction to restrain the collection of the fees and emoluments pertaining to an office, pending a contest as to the title. And it may be affirmed as a general and well established rule that equity will not lend its interference in a contest between conflicting claimants to an office to enjoin the incumbent *de facto* from receiving the salary, fees or emoluments pertaining to such office, since such interference would, in effect, practically decide the disputed questions of title involved, and would thus usurp to a court of equity, through its preventive remedy by injunction, a jurisdiction which can only be exercised in a legal forum.<sup>28</sup> And the fact that the fees and emoluments of the office may be recovered in an action at law by the person actually entitled is a sufficient bar to relief in equity, when it is not shown that the action at law would be ineffectual.<sup>29</sup> Nor will a court of equity interfere by injunction in such case, even though it should be of opinion that defendant has intruded himself into an office to which he is not entitled, such questions being foreign to the well defined jurisdiction of equity.<sup>30</sup> Nor is the insolvency of the defendant a sufficient ground for relief

Stahl, 83 Fed., 940; Couper *v.* Smyth, 84 Fed., 757; Woods *v.* Gary, 37 Washington Law Reporter, Sept. 16, 1897. A contrary doctrine was laid down in Priddie *v.* Thompson, 82 Fed., 186 and again followed by the same court in Butler *v.* White, 83 Fed., 578. The latter case, however, was reversed by White *v.* Berry, *supra*.

<sup>28</sup> Tappan *v.* Gray, 9 Paige, 507, affirmed 7 Hill, 259; Stone *v.* Wetmore, 42 Ga., 601; Colton *v.* Price,

50 Ala., 424; McAllen *v.* Rhodes, 65 Tex., 348; Lawrence *v.* Leidigh, 58 Kan., 676, 50 Pac., 889. And see Peet *v.* White, 43 Iowa, 400, where an injunction was refused which was sought to restrain the clerk of a court from paying over to his predecessor fees accruing during the official term of such predecessor.

<sup>29</sup> Colton *v.* Price, 50 Ala., 424.

<sup>30</sup> Tappan *v.* Gray, 9 Paige, 507, affirmed 7 Hill, 259.

in such cases, since the public interest requires that every public office should have at least a *de facto* incumbent who is legally entitled to be paid for his services.<sup>31</sup>

§ 1315. **Possession of officers *de facto* protected.** While, as is thus shown, courts of equity uniformly refuse to interfere by the exercise of their preventive jurisdiction to determine questions relating to the title to office, they frequently recognize and protect the possession of officers *de facto*, by refusing to interfere with their possession in behalf of adverse claimants, or, if necessary, by protecting such possession against the interference of such claimants. Thus, equity will refuse to enjoin officers *de facto* from exercising the duties and functions pertaining to their office, pending a litigation in the nature of *quo warranto* to determine their title, such refusal being based upon a recognition of that element of public interest which requires that some one should continue to exercise the duties of a public office, pending a litigation as to its title.<sup>32</sup> Upon the other hand, the actual incumbents of an office may be protected, pending a contest as to their title, from interference with their possession, and with the exercise of their functions.<sup>33</sup> Thus, the officers *de facto* of a school

<sup>31</sup> *Lawrence v. Leidigh*, 58 Kan., 676, 50 Pac., 889.

<sup>32</sup> *State v. Durkee*, 12 Kan., 308; *State v. Rice*, 66 S. C., 2, 44 S. E., 80.

<sup>33</sup> *Brady v. Sweetland*, 13 Kan., 41; *State v. Superior Court*, 17 Wash., 12, 48 Pac., 741, 61 Am. St. Rep., 893; *Reemelin v. Mosby*, 47 Ohio St., 570, 26 N. E., 717; *Rhodes v. Driver*, 69 Ark., 606, 65 S. W., 106, 86 Am. St. Rep., 215; *Stenglein v. Saginaw Circuit Judge*, 128 Mich., 440, 87 N. W., 449; *Guillote v. Poincy*, 41 La. An., 333, 6 So., 507, 5 L. R. A., 403. See *Goldman v. Gillespie*, 43 La. An., 83, 8 So., 880. In *Stenglein v. Saginaw Cir-*

*cuit Judge*, *supra*, it does not appear that an action at law was pending to try the disputed title to the office in question, but the court recognize the rule as above announced. In *Armijo v. Baca*, 3 New Mex., 294, 6 Pac., 938, the court went so far as to grant an injunction restraining a claimant of the office of sheriff from interfering with plaintiff's possession of the office although there was no legal proceeding pending or about to be brought for the purpose of determining the title to the office. And in *Poyntz v. Shackelford*, 107 Ky., 546, 54 S. W., 855, the court, as a court of equity, adjudicated

district may restrain persons claiming to be officers *de jure*, but who are not in possession, from taking possession of the school house, and from interfering with plaintiffs in their employment of teachers and in their management of school affairs; and this, notwithstanding the fact that the defendants thus enjoined claim to be the legally elected officers, and have instituted proceedings in *quo warranto* to establish their title.<sup>34</sup> And the granting of an injunction in such case in no manner determines the questions of title involved, but merely goes to the protection of the present incumbents against the interference of claimants out of possession, and whose title is not yet established.<sup>35</sup> And as above pointed out, the relief in such cases is based upon the plaintiff's possession of the office in question and upon the public necessity which requires an incumbent for every public office. Where, therefore, there is no showing that plaintiff is in the actual possession of a disputed office or is exercising any of the duties of that office, the relief will be denied as against the *de jure* claimant thereof.<sup>36</sup>

§ 1315 a. **Equity may determine title to office when question arises incidentally.** The rule announced in the preceding sections which forbids interference by courts of equity for the purpose of determining disputed questions concerning the appointment or election of public officers is to be understood as

the question of the title to the office in question and, having determined that plaintiff was the rightful incumbent, granted an injunction restraining defendants from interfering with his possession of the office. It is believed that these two cases go to an unwarranted extreme and that the injunctions should have been limited to the pendency of legal proceedings brought for the purpose of determining the disputed question of title to the office. In *Arnold v. Henry*, 155 Mo., 48, 55 S. W., 1089, 78 Am.

St. Rep., 556, the court denied relief because, first, there was no legal proceeding pending to try the disputed title to the office, and, secondly, it appeared that defendant and not plaintiff was in possession.

<sup>34</sup> *Brady v. Sweetland*, 13 Kan., 41.

<sup>35</sup> *Brady v. Sweetland*, 13 Kan., 41; *Guillote v. Poincy*, 41 La. An., 333, 6 So., 507, 5 L. R. A., 403.

<sup>36</sup> *School District v. Weise*, 77 Minn., 167, 79 N. W., 668.

applying only to cases where the title to the office is the sole issue involved, and where the bill is filed for the primary purpose of determining that issue. And where the question as to the title to public office arises merely incidentally to the determination of a suit of which a court of equity otherwise has jurisdiction, the rule has no application. Thus, equity will entertain jurisdiction of a bill brought to enjoin the prosecution of condemnation proceedings, where the right to the relief is based upon the charge that one of the officials who had instituted the proceedings was not in fact a duly appointed official; and in such case the court may pass upon the validity of the appointment in question for the purpose of determining the issues thus properly before it.<sup>37</sup>

§ 1316. **Holding elections.** Equity will not enjoin the holding of an election for a public office at the suit of citizens and electors who fail to show in what manner they will be injured by such election, either in person or property. Plaintiffs, in such case, are to be regarded as mere volunteers, having no right to invoke the extraordinary aid of equity in a matter in which they have no interest other than that which is common to the public at large. And such a case may be regarded as analogous to that of private citizens attempting to enjoin a public nuisance without showing some special injury, peculiar to themselves, and aside from the general injury to the public.<sup>38</sup> Indeed, a still broader doctrine has been asserted and it has been held that, the power of holding an election being a political power, equity has no jurisdiction to restrain officers intrusted by law with the duty of holding elections from the exercise of such power.<sup>39</sup>

<sup>37</sup> Hurley v. Levee Commissioners, 76 Miss., 141, 23 So., 580. And see, *ante*, § 1235 for the application of the same principle in cases involving disputed questions of

title to offices in private corporations.

<sup>38</sup> Jones v. Black, 48 Ala., 540.

<sup>39</sup> Harris v. Schryock, 82 Ill., 119; Morgan v. County Court, 53 West Va., 372, 44 S. E., 182.

§ 1317. **Effect of injunction upon mandamus.** An injunction restraining a public officer from performing a particular act will not be allowed to have the effect of preventing the performance of the act, under a peremptory writ of *mandamus* previously granted by a court of competent jurisdiction. Thus, where a county judge is directed by a peremptory *mandamus* to issue county bonds in aid of a subscription to a railway, a subsequent injunction restraining him from issuing such bonds presents no obstacle to the enforcement of the *mandamus*.<sup>40</sup> But the effect of an injunction restraining a public officer from doing an official act is to protect him from subsequent proceedings by *mandamus* to compel the doing of the act enjoined. Thus, where a town treasurer is restrained by injunction from paying over certain moneys collected by him in his official capacity, a writ of *mandamus* will not lie to compel him to make the payment.<sup>41</sup>

§ 1318. **Opening road across works of railway.** The fact that persons injured by the acts of public officers have a possible remedy at law will not deprive them of relief in equity. And where public officers are proceeding illegally and improperly, under color and claim of right, to open a private road across the works of a railway company, an injunction may be granted, although complainants might have lain by until the road was completed, and then recovered damages at law for injuries sustained, equitable relief being granted in such case on the ground of preventing a multiplicity of suits.<sup>42</sup>

§ 1319. **Creation of new county.** Commissioners appointed under an act of legislature for the purpose of creating a new county, which is held to be in violation of the constitution of the state, may be perpetually enjoined from proceeding, notwithstanding the common law remedy by *quo warranto*, the

<sup>40</sup> *Cumberland & O. R. Co. v. Judge of Washington County Court*, 10 Bush, 564. *cher*, 6 Paige, 83. And see *Belknap v. Belknap*, 2 Johns. Ch., 463; *Livingston v. Livingston*, 6 Johns.

<sup>41</sup> *State v. Kisbert*, 21 Wis., 387. Ch., 497.

<sup>42</sup> *Mohawk & H. R. Co. v. Art-*

legal remedy being manifestly inadequate to meet the necessities of such a case, since it can not operate prospectively or prevent the threatened action. The interposition of equity under such circumstances is based upon the doctrine of *quia timet* and the necessity of preventing irreparable mischief.<sup>43</sup> If, however, the county has been fully organized and put into operation under the act of the legislature establishing it, a court of chancery has no power to abolish it, or to restrain its officers from performing their functions.<sup>44</sup>

§ 1320. **Excess of power by drainage commissioners.** Where inspectors, appointed in pursuance of a law of the state for the drainage of swamp lands, exceed their powers, thereby causing injury to neighboring mill owners in the enjoyment of the water for their mills, an injunction may be allowed, even though an action of trespass would lie, since the case is not one of an ordinary trespass, but the injury is continuing in its nature, and the interposition of equity is needed to prevent permanent mischief and a multiplicity of suits.<sup>45</sup> So commissioners for the drainage of swamp lands, appointed under an act of legislature which is held to be unconstitutional and void, may be enjoined from proceeding under the act by the owners of land who are aggrieved thereby.<sup>46</sup>

§ 1321. **Taxpayers proper parties.** He who seeks to restrain improper or unlawful conduct on the part of public officers must allege sufficient facts to show that he has such an interest in the public welfare as to make him a proper party to prevent the commission of a public wrong. It will generally suffice that the persons seeking the injunction are residents and taxpayers. Thus, it is held that complainants,

<sup>43</sup> *Bradley v. Commissioners*, 2 Humph., 428. And see *State v. Judge*, 42 La. An., 1104, 8 So., 305, for an injunction against proceedings under an alleged unconstitutional act of the legislature creating a new parish.

<sup>44</sup> *Ford v. Farmer*, 9 Humph., 152.

<sup>45</sup> *Belknap v. Belknap*, 2 Johns. Ch., 463.

<sup>46</sup> *Hartwell v. Armstrong*, 19 Barb., 166.



who are voters and taxpayers in a county, are proper parties to enjoin unauthorized expenditures of county funds by a county judge.<sup>47</sup> But to warrant the relief in behalf of citizens and taxpayers against acts of public officers, it should be shown that plaintiff's rights will be greatly and irreparably injured by the acts which it is sought to enjoin, and unless this is shown the relief will be denied.<sup>48</sup> And an injunction will not be granted to restrain county officers from removing their offices to another location, at the suit of one who does not show himself to be a resident and voter of the county, and who shows no interest in the result of the controversy.<sup>49</sup>

§ 1322. **State courts will not enjoin United States officers; revenue officers.** The state courts have no jurisdiction or power to interfere by injunction with officers of the United States in the discharge of their duties under an act of Congress. They will not, therefore, assume jurisdiction to enjoin a receiver or register of a United States land office from making a sale of certain lands as public lands of the United States, which are claimed by plaintiff as his own property, there being no power outside of the federal government to interfere with such proceedings for the purpose of restraining the action of such officers in making a sale.<sup>50</sup> Nor will a federal court enjoin officers of the government from the enforcement of the laws relating to the collection of internal revenue, when the relief is invoked merely upon the fears and apprehensions of plaintiff that such enforcement will injure his business, no right of plaintiff having been actually interfered with.<sup>51</sup>

§ 1323. **President of United States will not be enjoined; nor governor of state.** A bill for an injunction will not lie against the President of the United States, to prevent him from executing a law of Congress, on the ground of its unconstitu-

<sup>47</sup> *Rice v. Smith*, 9 Iowa, 570.

<sup>49</sup> *Henderson v. Marcell*, 1 Kan.,

<sup>48</sup> *Normand v. Otoe Co.*, 8 Neb., 137.

18; *Peeples v. Byrd*, 98 Ga., 696, 25

<sup>50</sup> *Brewer v. Kidd*, 23 Mich., 440.

S. E., 677. And see *Caruthers v.*

<sup>51</sup> *Mason v. Rollins*, 2 Bissell, 99.

*Harnett*, 67 Tex., 127, 2 S. W., 523.

tionality, since the judicial department of the government has no power to interfere with the executive in the performance of his official duties. Nor will a bill of such a nature be entertained in a court of equity because it describes the President as a citizen of a state.<sup>52</sup> And, upon the same principle, the governor of a state will not be restrained by injunction from acting under an alleged unconstitutional statute of the state.<sup>53</sup>

§ 1324. **Alterations in stream; public improvements.** An injunction will not be granted in behalf of a riparian owner to restrain the agents of the government from making alterations in a navigable stream, where the alleged injury is mere matter of opinion and is denied by defendants. But it would seem that where Congress intrusts an appropriation for public improvements to one of the departments, which in turn employs agents to do the work, this department and its agents may be enjoined from doing the work in an improper manner, although an injunction would not lie against the United States.<sup>54</sup>

§ 1325. **Taking private property; sheriff acting under process.** Public officers, acting under authority of a state, will not be restrained from taking private property for works of public improvement until suitable compensation is made for the property taken, where a mode is provided by law for the assessment of the damages sustained.<sup>55</sup> Nor will equity lend its aid to enjoin a sheriff from proceeding under process of the court, where the injunction is sought merely to aid complainant in a proceeding at law which is unwarranted and oppressive.<sup>56</sup>

<sup>52</sup> *Mississippi v. Johnson*, 4 Wal., 475. And see § 1326, *post*.

<sup>53</sup> *Frost v. Thomas*, 26 Col., 222, 56 Pac., 899, 77 Am. St. Rep., 259.

<sup>54</sup> *Avery v. Fox*, 1 Abb. U. S. R., 246.

<sup>55</sup> *Heston v. Canal Commissioners*, Brightly, 183.

<sup>56</sup> *Haight v. Executors*, 2 Green Ch., 386. "I can not," says Vroom, Chancellor, in this case, "restrain a public officer acting under the writ of this court, for the purpose of aiding the complainants in what I consider an unlawful proceeding in a court of law."

§ 1326. **Executive and state officers, when enjoined; illustrations; excluding plaintiff from use of mails.** Delicate and interesting questions have frequently arisen touching the extent to which the judiciary may interfere with the executive department of the government, either state or national, and the jurisdiction of equity to enjoin the acts of officers whose duties partake of an executive or *quasi* executive character. The true test in all such cases is as to the nature of the specific act in question, rather than as to the general functions and duties of the officer. If the act which it is sought to enjoin is executive instead of ministerial in its character, or if it involves the exercise of judgment and discretion upon the part of the officer, as distinguished from a merely ministerial duty, its performance will not be prevented by injunction.<sup>57</sup> As illustrating the distinction it is held that the secretary of the interior and the commissioner of the land office will not be enjoined from canceling an entry under which citizens claim an equitable interest in certain lands, the act of the officers in such case requiring the exercise of judgment and discretion, in distinction from a purely ministerial duty.<sup>58</sup> So an injunction will not lie to restrain the governor or other executive officers of a state from the performance of official acts in their executive capacity.<sup>59</sup> Nor will a postmaster be

<sup>57</sup> *Gaines v. Thompson*, 7 Wal., 347; *New Orleans v. Paine*, 147 U. S., 261, 13 Sup. Ct. Rep., 303, affirming S. C., 2 C. C. A., 516, 51 Fed., 833, 2 U. S. App., 330, which affirmed S. C., 49 Fed., 12; *Enterprise Savings Association v. Zumbstein*, 15 C. C. A., 153, 67 Fed., 1000; *Scofield v. Perkerson*, 46 Ga., 350; S. C., 46 Ga., 325; *Peeples v. Byrd*, 98 Ga., 696, 25 S. E., 677; *Western R. Co. v. De Graff*, 27 Minn., 1, 6 N. W., 341; *Secombe v. Kittelson*, 29 Minn., 555, 12 N. W., 519; *Western Star Lodge v.*

*Schminke*, 4 McCrary, 366; *Donaldson v. Wright*, 7 App. D. C., 45. And the rule was recognized in *Riverside Oil Co. v. Hitchcock*, 190 U. S., 316, although this was a *mandamus* suit.

<sup>58</sup> *Gaines v. Thompson*, 7 Wal., 347. And see *Brem v. Houck*, 101 N. C., 627, 8 S. E., 365.

<sup>59</sup> *Western R. Co. v. De Graff*, 27 Minn., 1, 6 N. W., 341; *Secombe v. Kittelson*, 29 Minn., 555, 12 N. W., 519; *Bates v. Taylor*, 87 Tenn., 319, 11 S. W., 266.

enjoined from obeying an order of the postmaster-general directing the removal of a postoffice, the power to make such removal being vested by law in the postmaster-general, to be exercised in his discretion.<sup>60</sup> So equity will not enjoin a postmaster from following the instructions of the postmaster-general as to returning all registered mail addressed to certain persons suspected of conducting a lottery, where the postmaster-general is acting within the limits of the powers conferred upon him by the statutes regulating the use of the mails.<sup>61</sup> And where the location of a boundary line of a land

<sup>60</sup> *Western Star Lodge v. Schminke*, 4 McCrary, 366.

<sup>61</sup> *Enterprise Savings Association v. Zumstein*, 15 C. C. A., 153, 67 Fed., 1000. In this case it was held, under an act of Congress conferring upon the postmaster-general the power, upon evidence satisfactory to him that any person was engaged in the conduct of a lottery, to instruct postmasters to return all registered mail addressed to such persons and to refuse payment of money orders to their order, that the action of the postmaster-general under this statute involved the exercise of his judgment and discretion and that equity should therefore not interfere with that action by injunction. Lurton, J., uses the following language: "The settlement of the question undoubtedly involved the exercise of judgment and discretion, and this very fact operates to take his duty out of the mere ministerial class, and therefore beyond the control or review of the judicial department of government, by means of *mandamus* or injunction. \* \* \* If the postmaster-general could not have been com-

pelled by judicial proceedings to have made an order inhibiting the use of the registry or postal money department by one at the suit of another, because the duty was not purely ministerial, but involved the exercise of judgment and discretion, it must follow that the *bona fide* exercise of such judgment and discretion under a statute expressly reposing the power would not justify the judicial department in reversing his action by the substitution of its judgment for that of the officer to whom congress had intrusted it." But in *Hoover v. M'Chesney*, 81 Fed., 472, it was held, under the same statute, that an order of the postmaster-general directing the seizure and return of all mail addressed to a person supposed to be engaged in conducting a lottery, regardless of whether or not such mail is, under the act, non-mailable, is beyond his power or authority, and accordingly a postmaster, acting under such an order, was enjoined from withholding and refusing to deliver to plaintiff mail which was directed to him and upon which there were no words,

grant is pending before the land department of the government and a survey of such line has been made but has never been finally and formally approved by the secretary of the interior, an injunction will not issue to restrain the survey and location of another line.<sup>62</sup> And where an executive officer of a state is empowered by law to issue execution against defaulting officers of railway companies and their sureties, the issuing of such execution being an act of the executive department of the government, and such department having exclusive jurisdiction over the particular subject-matter, the exercise of that jurisdiction will not be interfered with by injunction.<sup>63</sup> Nor will state officers be restrained from enforcing a law of the state merely upon the ground of its alleged unconstitutionality; especially when plaintiff shows no injury to himself as likely to result from the enforcement of the law.<sup>64</sup> And in general it may be said that the courts will not interfere by injunction to restrain officers of a state from compliance with a law of the state requiring the performance of a public duty at their hands. They will not, therefore, enjoin such officers from re-

language or other indications that such mail was directed to him in the conduct of the alleged lottery, the court holding that the right of the public to the lawful use of the United States mails is not a mere gratuity but is in the nature of a property right which will be protected by injunction in the proper case. Barr, J., uses the following language: "It is conceded to the broadest extent that, if the postmaster-general had the constitutional right to not only declare that the complainant was engaged in conducting a lottery for the distribution of money or other personal property by chance through the mails, but thereupon to prohibit him from the use of the mails absolutely, then the

court cannot revise the postmaster-general's discretion and judgment under the statute; but we submit that, if he had no constitutional right to exercise the judgment and discretion which he has exercised in thus condemning the plaintiff to a forfeiture of the use of the postal service of the United States, this court can, by proper proceeding, so declare."

<sup>62</sup> *New Orleans v. Paine*, 147 U. S., 261, 13 Sup. Ct. Rep., 303, affirming S. C., 2 C. C. A., 516, 51 Fed., 833, 2 U. S. App., 330, which affirmed S. C., 49 Fed., 12.

<sup>63</sup> *Scofield v. Perkerson*, 46 Ga., 350, S. C., 46 Ga., 325.

<sup>64</sup> *Gibbs v. Green*, 54 Miss., 593; *Birmingham v. Cheetham*, 19 Wash., 657, 54 Pac., 37.

ceiving bids for a public loan and issuing stock therefor, when such duty is imposed upon them by law; even though the law under which they are acting is alleged to be unconstitutional.<sup>65</sup> So the secretary of state will not be enjoined from publishing notices of the submission to the voters of a constitutional amendment proposed by the legislature where such duty is imposed upon him by law, although it is charged that such amendment would be invalid when adopted by the voters.<sup>66</sup> So equity has no jurisdiction to enjoin the secretary of state from laying before the legislature a certificate of the commissioners of a county court ascertaining the result of an election, where the duty of so doing is by law imposed upon that officer.<sup>67</sup> Nor will the relief be granted in such case to restrain the commissioners from certifying to the governor the result of the election.<sup>68</sup> Nor will a federal court entertain a bill for an injunction to compel state officers to execute a law of the state.<sup>69</sup> Upon the other hand, if the acts which it is sought to restrain are of a strictly ministerial as distinguished from an executive or political nature, the fact that they have been committed to executive officers, such as the governor of a state, or a state auditor, will not prevent relief by injunction in a proper case.<sup>70</sup> And where the postmaster-general has ordered plaintiff excluded from the use of the

<sup>65</sup> *Thompson v. Commissioners of Canal Fund*, 2 Ab. Pr., 248. And an injunction has been refused which was sought to restrain state officers from violating an alleged contract with plaintiffs for furnishing text books for the use of the schools of the state. *Bancroft v. Thayer*, 5 Sawy., 502.

<sup>66</sup> *People v. Mills*, 30 Col., 262, 70 Pac., 322.

<sup>67</sup> *Fleming v. Guthrie*, 32 West Va., 1, 9 S. E., 23, 3 L. R. A., 53, 25 Am. St. Rep., 792.

<sup>68</sup> *Alderson v. Commissioners*, 32

West Va., 640, 9 S. E., 868, 5 L. R. A., 334, 25 Am. St. Rep., 840.

<sup>69</sup> *McCauley v. Kellogg*, 2 Woods, 13.

<sup>70</sup> *Martin v. Ingham*, 38 Kan., 641, 17 Pac., 162; *Chesapeake & O. R. Co. v. Miller*, 19 West Va., 408; *Judson v. Smith*, 104 Mo., 61, 15 S. W., 956. See also *Martin v. Lacy*, 39 Kan., 703, 18 Pac., 951. But in *Martin v. Ingham*, 38 Kan., 641, 17 Pac., 162, the injunction was denied upon other than jurisdictional grounds.

United States mails in a case which, upon the conceded facts, does not come within the provisions of the statute authorizing the postmaster-general to take such action, relief by injunction will be granted.<sup>71</sup> So the secretary of the interior may be enjoined from nullifying and setting aside the action of his predecessor in approving and ordering certain documents and maps to be filed in the office of the commissioner of the general land office, under an act of Congress granting to a railroad a right of way through the public lands of the United States, where such action by his predecessor operates as a grant of lands to such railroad.<sup>72</sup> So where plaintiff has title to land under a patent from the government showing the land as bordering upon a certain lake, the threatened action of the surveyor-general of the state, acting under instructions from

<sup>71</sup> *American School of Magnetic Healing v. McAnnulty*, 187 U. S., 94, 23 Sup. Ct. Rep., 33. In this case Mr. Justice Peckham uses the following language: "Conceding for the purpose of this case, that Congress has full and absolute jurisdiction over the mails, and that it may provide who may and who may not use them, and that its action is not subject to review by the courts, and also conceding the conclusive character of the determination by the Postmaster General of any material and relevant questions of fact arising in the administration of the statutes of Congress relating to his department, the question still remains as to the power of the court to grant relief where the Postmaster General has assumed and exercised jurisdiction in a case not covered by the statutes, and where he has ordered the detention of mail matter when the statutes have not granted him power so to order. \* \* \* \* \*

The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld."

<sup>72</sup> *Noble v. Union River Logging Railroad Co.*, 147 U. S., 165, 13 Sup. Ct. Rep., 271.

the secretary of the interior, in having a new survey made upon the ground that the old plat makes the lake larger than it really is will be enjoined, where such action would throw a cloud upon plaintiff's title and would result in irreparable injury from the cutting of timber.<sup>73</sup> And where, under an act of Congress, certain lands have ceased to be a part of the public domain and are therefore no longer within the jurisdiction of the land office of the government, the secretary of the interior and the commissioner of the general land office will be restrained by injunction from directing a survey of such lands or in any other way treating them as part of the public domain, their action in this respect being beyond their authority.<sup>74</sup> But a secretary of state will not be enjoined from issuing a grant of lands to defendants, which lands are claimed by plaintiff, who shows no right or title in himself which is invaded by defendants.<sup>75</sup>

§ 1327. **Acting under unconstitutional law.** While the jurisdiction of equity to restrain public officers, at the suit of the people, from proceeding in violation of law to the prejudice of the public is recognized and well established, such officers being regarded as trustees of franchises or property for the public benefit, and therefore amenable to the jurisdiction of equity, yet when such suit is instituted in behalf of the state as plaintiff the state is not exempt from the rules applicable to ordinary suitors. A clear right to the relief demanded must, therefore, be shown, and it must appear that some act is done or threatened by defendants which will be destructive of such right.<sup>76</sup> And such officers will not be enjoined from

<sup>73</sup> *Kirwin v. Murphy*, 28 C. C. A., 348, 83 Fed., 275.

<sup>74</sup> *Smith v. Reynolds*, 9 App. D. C., 261. This case was afterward reversed for want of necessary parties. 166 U. S., 717, 17 Sup. Ct. Rep., 998.

<sup>75</sup> *Brem v. Houck*, 101 N. C., 627, 8 S. E., 365.

<sup>76</sup> *People v. Canal Board*, 55 N. Y., 390, affirming S. C., 1 Thomp. & C., 309; *State v. Pennoyer*, 26 Ore., 205, 37 Pac., 906, 41 Pac., 1104 (on petition for rehearing), 25 L. R. A., 862; *State v. Lord*, 28 Ore., 498, 43 Pac., 471, 31 L. R. A., 473.



acting under a law which is alleged to be unconstitutional and void, when it is not shown that they intend or propose to act under the law; and the courts will not enjoin in advance of any proceedings had or threatened by defendants.<sup>77</sup>

§ 1328. **Injunction in aid of mandamus; payment of money.** An injunction is not an appropriate remedy for enforcing or executing a judgment awarding a peremptory writ of *mandamus* against a public officer. And where a state treasurer has been required by *mandamus* to pay a sum of money to the relator, the latter will not be allowed the aid of an injunction to restrain the treasurer from making any payments until he has paid the sum required by the proceedings in *mandamus*.<sup>78</sup> In England, however, an injunction has been granted against the lords of the treasury to restrain them from performing a merely ministerial duty, such as the payment of money pending a contest between different claimants of the fund.<sup>79</sup>

§ 1329. **Board of medical examiners.** Where, under the law of a state, a board of medical examiners is appointed in each county to examine applicants for certificates to practice medicine, a failure upon the part of certain members of such board to notify others of the time and place of organizing the board, will not warrant an injunction to restrain its operations, when such notice is not absolutely required by the statute.<sup>80</sup>

§ 1329 a. **Federal court may enjoin state officials from acting under unconstitutional state statute; irreparable injury must be shown.** A federal court sitting in equity may enjoin officers of a state from proceeding to execute or from otherwise doing acts under an unconstitutional law of the state where the attempted enforcement of the invalid statute will result in irreparable injury to the plaintiff for which there is no adequate remedy at law.<sup>81</sup> But where relief is sought against

<sup>77</sup> *People v. Canal Board* 55 N. Y., 390, affirming S. C., 1 Thomp. & C., 309.

<sup>78</sup> *Citizens Bank of Louisiana v. Dubuclet*, 26 La. An., 81.

<sup>79</sup> *Ellis v. Earl Grey*, 6 Sim., 214.

<sup>80</sup> *Howard v. Parker*, 49 Tex., 236.

<sup>81</sup> *Scott v. Donald*, 165 U. S., 107, 17 Sup. Ct. Rep., 262, and cases cited; *Minneapolis Brewing Co. v. McGillivray*, 104 Fed., 258.

the enforcement of an unconstitutional statute, either state or federal, the unconstitutionality of the law is not alone sufficient to justify the granting of the writ, but irreparable injury must also be alleged and clearly proven, or some other special circumstance must be shown which brings the case under some recognized head of equity jurisdiction. And where the plaintiff fails to make such a showing, the relief will be denied and he will be left to his remedy at law.<sup>82</sup>

<sup>82</sup> *Cruickshank v. Bidwell*, 176 U. S., 73, 20 Sup. Ct. Rep., 280.

## CHAPTER XXIII.

### OF INJUNCTIONS IN PARTNERSHIP MATTERS.

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#### I. PRINCIPLES GOVERNING THE JURISDICTION.

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§ 1330. **General rule and illustrations.** Courts of equity will entertain jurisdiction to prevent by injunction members of a copartnership from the commission of acts inconsistent with the terms of their agreement, and from violating the rights of their copartners. The jurisdiction is founded upon well established principles of equity, and is exercised irrespective of whether a dissolution of the partnership is sought.<sup>1</sup> Thus,

<sup>1</sup> *Cropper v. Coburn*, 2 *Curtis*, *Wigram*, Vice Chancellor, *that*, "If 465; *Marble Company v. Ripley*, 10 *that were the rule of the court*, *Wal.*, 339; *New v. Wright*, 44 *if a bill would in no case lie to* *Miss.*, 202; *Miles v. Thomas*, 9 *Sim.*, *compel a man to observe the cove-* *606*; *Leavitt v. Windsor L. & I.* *nants of a partnership deed, unless* *Co.*, 4 *C. C. A.*, 425, 54 *Fed.*, 439; *the bill seeks a dissolution of the* *Fairthorne v. Weston*, 3 *Hare*, 387. *partnership, it is obvious that a* *person fraudulently inclined might,*

where several partners are engaged in trade, one of their number may be enjoined from using force to the obstruction or interruption of the trade, and from removing or displacing servants employed by the other partners, and from removing the books and papers relating to the business.<sup>2</sup> And where one of the members of a firm has been temporarily insane, and on his recovery his copartners exclude him from the management of the firm business, an injunction will be allowed to restrain them from thus excluding him from the business.<sup>3</sup> So where a partnership is formed for a term of years, to be terminated on notice by either party for a given length of time, an injunction will be granted to prevent one partner from obstructing the other in the enjoyment of his partnership rights, and from any improper use of the partnership funds or effects.<sup>4</sup> And the use by one partner of firm property for purposes foreign to the partnership, and in violation of the articles and without the consent of his copartner, affords sufficient ground for an injunction.<sup>5</sup> So the administrator of a deceased partner may enjoin the surviving partner and others who are in possession of the firm assets from disposing of them with intent to appropriate the proceeds to their own use, defendants being alleged to be insolvent.<sup>6</sup> But more temptation to dishonesty and to the abuse or improper use of partnership property will not of itself induce a court of equity to interfere. And where all the partners save one engaged in the publication of a newspaper are also partners

of his own mere will and pleasure, compel his copartner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract." Lord Eldon, however, was averse to granting an injunction to prevent the breach of a covenant in partnership articles, unless the case was a proper one for a dissolution of the firm and

unless the bill sought a dissolution. See *Marshall v. Colman*, 2 Jac. & W., 266.

<sup>2</sup> *Brewers' Case*, 19 Ves., second English edition, note to page 148.

<sup>3</sup> *Anonymous*, 2 Kay & J., 441.

<sup>4</sup> *Hall v. Hall*, 12 Beav., 414.

<sup>5</sup> *New v. Wright*, 44 Miss., 202.

<sup>6</sup> *Fletcher v. Vandusen*, 52 Iowa, 448, 3 N. W., 488.

in a rival publication, an injunction will not be granted to restrain one of the papers from using the material of the other under a contract under which the parties have long acted.<sup>7</sup> But an injunction is proper in such a case to prevent one of the papers from publishing any information obtained exclusively at the expense of the other, until published in the paper thus obtaining it.<sup>8</sup>

§ 1331. **Removal of firm books enjoined.** The removal by one partner of partnership books from the counting house of the firm, contrary to an express covenant in the copartnership articles, affords sufficient ground for enjoining such partner from continuing to violate the covenant, and such an injunction may be continued to the final hearing.<sup>9</sup> And upon a bill for a dissolution and an accounting an injunction will be granted to restrain one partner from removing the firm books, or from keeping them at any place other than the place of business of the firm, although the books have already been removed and the injunction, in effect, operates as a mandatory injunction to compel their return.<sup>10</sup>

§ 1332. **Enforcement of judgment between partners.** Upon a bill for an accounting and settlement of all partnership matters between members of a firm, the defendant partner may be enjoined from enforcing a judgment previously recovered in his favor against the plaintiff partner, when the firm matters which are made the foundation of the suit in equity for the accounting could not have been urged in defense of the action in which such judgment was recovered. And in such a case the failure or omission to enjoin the prosecution of the action at law in which the judgment was recovered will not prevent an injunction against the enforcement of the judgment.<sup>11</sup>

<sup>7</sup> *Glassington v. Thwaites*, 1 Sim. & St., 124.

<sup>8</sup> *Id.*

<sup>9</sup> *Taylor v. Davis*, 3 Beav., 388, note.

<sup>10</sup> *Greatrex v. Greatrex*, 1 DeG. & Sm., 692.

<sup>11</sup> *Gregg v. Brower*, 67 Ill., 525.

§ 1333. **Withdrawal from firm; violation of articles.** When a partnership is formed for a given period, a member of the firm may be enjoined from withdrawing and entering upon a new partnership before the expiration of that period, and the new partners may also be enjoined from carrying on business with such partner, or otherwise, in the name of the original firm, and from receiving letters addressed to such firm.<sup>12</sup> And where, in violation of his partnership articles, one of the proprietors of a theater engages in writing plays for another theater, an injunction may properly be allowed.<sup>13</sup>

§ 1334. **Judgment against one partner.** Where, under a judgment at law against one member of a copartnership for his individual debt, his interest in the firm property has been levied upon, a court of equity will not enjoin the proceedings until the partnership accounts have been liquidated. Such a proceeding would inevitably cause great delay and embarrassment to the individual creditors, and equity will not lend its aid to thus impede a creditor in the enforcement of his just demand.<sup>14</sup> So equity will not enjoin a judicial sale of part-

<sup>12</sup> *England v. Carling*, 8 Beav., 129.

<sup>13</sup> *Morris v. Colman*, 18 Ves., 437.

<sup>14</sup> *Moody v. Payne*, 2 Johns. Ch., 548; *Wickham v. Davis*, 24 Minn., 167. The rule as laid down in the text is sustained by no less an authority than Chancellor Kent, who observes in *Moody v. Payne*: "I do not know that this court has ever undertaken to stop an execution at law, in such a case, until the partnership accounts have been taken, and it would be too much for me to assume it without precedent. The principle would go to stay executions at law, in every case, against the partnership property of one partner who owed separate debts, until the disclosure and liq-

uidation of the concerns of the copartnership. This would produce inconceivable delay and embarrassment in respect to separate creditors." But see *Place v. Sweetzer*, 16 Ohio, 142, and *Sutcliffe v. Dohrman*, 18 Ohio, 181, where it is held that when an execution has been levied upon partnership property to satisfy the individual debt of a member of the firm, the sale of the property may be restrained until the interest of the partner is ascertained. And in *Williams v. Lewis*, 115 Ind., 45, 17 N. E., 262, it is held that the seizure and taking away of a portion of the partnership property under execution against one member of the firm may be enjoined. But an injunc-

nership property upon the application of firm creditors whose rights will not be affected by such sale, but the court will presume in such case that the sheriff intends to sell in accordance with law, and will not grant an injunction for the purpose of compelling him to do his duty.<sup>15</sup> And a creditor of the firm, who has not yet reduced his claim to judgment, has no such *quasi* lien upon the partnership property as to entitle him to the aid of equity to restrain a judgment creditor of an individual member of the firm from satisfying his judgment out of the firm property. The rule is deducible from the general principle that a creditor at large, or before judgment, is not entitled to the interference of a court of equity to prevent his debtor from disposing of his property, but must first reduce his claim to judgment.<sup>16</sup>

§ 1335. **Exclusion from business; warrant of attorney to confess judgment.** The exclusion of one partner from the premises where the firm business is being conducted, and preventing him from participation in the business, constitute sufficient cause to warrant a court of equity in restraining the remaining partner from receiving and collecting debts due the firm.<sup>17</sup> So the refusal by partners to permit an examination by their copartner of the books of account, and their giving of the firm notes in settlement of debts not owing by the firm, and their refusal to apply the firm funds in payment of its debts constitute sufficient ground for an injunction and for the appointment of a receiver.<sup>18</sup> But where one member of a firm has been enjoined from intermeddling with the partnership assets and effects, he is not guilty of a breach of the injunction in giving authority to an attorney to confess judgment has been refused which was sought to restrain the sale of a locomotive owned by three railway companies in partnership under a judgment against one of the companies. *Lamoille Valley R. Co. v. Bixby*, 55 Vt., 235.

<sup>15</sup> *Saunders v. Irwin*, 17 Hun, 342.

<sup>16</sup> *Young v. Frier*, 1 Stockt., 465; *Mitnigh v. Smith*, 2 C. E. Green, 259. For the general principle see, *post*, § 1403 *et seq.*

<sup>17</sup> *Wolbert v. Harris*, 3 Halst. Ch., 605.

<sup>18</sup> *Shannon v. Wright*, 60 Md., 520.

ment for a debt due to a creditor of the firm, for the purpose of enabling such creditor to obtain a priority over other creditors by levying on the partnership assets.<sup>19</sup>

§ 1336. **Sale of newspaper business by one partner enjoined.** In granting or withholding relief by injunction in cases arising between partners, the courts will look to the nature of the business in which the firm is engaged, and regard will be had to the scope of the authority of the partners as confined to that particular business. And where the object of a firm is not the buying and selling of goods, but the conducting of a newspaper, to which the continued ownership of the partnership property is indispensable, an attempt by one partner to sell the entire property of the firm will be enjoined, such an act not being properly within the scope of the partner's authority.<sup>20</sup>

§ 1337. **Rights of creditor without judgment.** While, as we have already seen, a creditor at large whose claim has not been established by judgment will not be allowed to interfere with the disposition either of his debtor's partnership or individual property, the rule may be varied by statute. And under a statute authorizing a creditor to vacate any conveyance or contract made by the debtor which is fraudulent as against creditors, without first reducing his claim to judgment, the creditor may rightfully enjoin a fraudulent assignment of the effects of a copartnership.<sup>21</sup> But an injunction in such case, while it will embrace all the partnership property included in the fraudulent assignment or transfer, will not affect the separate property held *bona fide* by individual members of the firm, and not claimed by them under any fraudulent transfer of property originally owned by the copartnership.<sup>22</sup>

§ 1338. **Illustrations of the general doctrine.** A member of a partnership who holds notes for the benefit of the firm,

<sup>19</sup> McCredie v. Senior, 4 Paige, 378.

<sup>21</sup> Sanderson v. Stockdale, 11 Md., 563.

<sup>20</sup> Sloan v. Moore, 37 Pa. St., 217.

<sup>22</sup> Id.



and attempts to pledge or pawn them for his own private debts, is guilty of such fraudulent misappropriation as will be restrained by a court of equity.<sup>23</sup> So, too, if one partner attempts to dispose of specific chattels belonging to the firm, pending litigation for the adjustment of the partnership affairs, he may be enjoined.<sup>24</sup> And if one partner brings an action at law against another, where, having regard to the state of the partnership business and accounts, such action should not be brought, an injunction may be granted.<sup>25</sup> So where one partner sells to the other his entire interest in the partnership property, with an implied warranty of title, a subsequent levy upon and sale of the property by creditors of the firm is such a failure of consideration as will warrant a court of equity in entertaining a bill, in behalf of the sureties of the purchaser, to enjoin proceedings at law for the purchase money.<sup>26</sup>

§ 1339. **Further illustrations.** An injunction has been allowed to restrain one person from representing another to be his partner and holding him out to the world as such, without his consent or authority.<sup>27</sup> But equity will not interfere to prevent a partner from acting in that capacity, merely because public confidence in the firm might be shaken if it were known that such person was a partner.<sup>28</sup> And where an injunction has been allowed to restrain one partner from interfering with another's rights as a member of the firm, it will be dissolved on

<sup>23</sup> *Stockdale v. Ullery*, 37 Pa. St., 486. And this was held under a statute authorizing injunctions to restrain acts "contrary to law," the court holding that acts contrary to equity were within the purview of the statute and should be enjoined accordingly.

<sup>24</sup> *Ellis v. Commander*, 1 Strob. Eq., 188. As to the effect of an injunction obtained by one partner to restrain his copartner from selling the firm property, upon an ac-

tion of replevin brought by a purchaser of the property in question after service of the injunction, see *Shelton v. Franklin*, 68 Ill., 333.

<sup>25</sup> *Gould v. Canham*, 1 Ch. Cas., 311.

<sup>26</sup> *Hough v. Chaffin*, 4 Sneed (Tenn.), 238.

<sup>27</sup> *Routh v. Webster*, 10 Beav., 561; *Walter v. Ashton*, (1902) 2 Ch., 282.

<sup>28</sup> *Anonymous*, 2 Kay & J., 441.

the coming in of the answer showing that the partnership has been dissolved by mutual consent.<sup>29</sup>

§ 1340. **Third person not enjoined from disposing of real estate.** In a suit between partners for a settlement of their firm affairs, a court of equity will not enjoin a third person, who is not shown to be in any manner connected with the partnership, from using or disposing of real estate the title to which is in him, upon an allegation that it has been fraudulently transferred to such third person by one of the partners.<sup>30</sup>

§ 1341. **Remedy provided by articles; non-compliance with articles.** Equity may properly refuse to interfere by injunction in partnership affairs, when the articles of copartnership provide a remedy for the adjustment of firm difficulties, until the parties have availed themselves of such remedy.<sup>31</sup> And when one member of a firm seeks to restrain his copartner from a violation of or departure from the terms of the partnership articles, the relief may properly be withheld when plaintiff himself has not complied with such articles.<sup>32</sup>

§ 1341 *a*. **When injunction against one partner binds other partner.** It has been held that an injunction running against a member of a firm, restraining him from doing certain acts in connection with the partnership business, has the effect of necessarily binding the other member of the firm. And accordingly an action for damages resulting from the wrongful granting of such injunction may be maintained by both partners.<sup>33</sup>

<sup>29</sup> Van Kuren *v.* Trenton Company, 2 Beas., 302.

<sup>32</sup> Smith *v.* Fromont, 2 Swanst., 330.

<sup>30</sup> McKee *v.* Griffin, 23 La. An., 417.

<sup>33</sup> Drews *v.* Williams, 50 La. An., 579, 23 So., 897.

<sup>31</sup> Carlen *v.* Drury, 1 Ves. & B., 154.

## II. DISSOLUTION OF THE FIRM.

- § 1342. Injunction pending action for dissolution.
- 1343. Agreements not to continue firm business.
- 1344. Urgent necessity must be shown; illustrations.
- 1345. Firm name and good-will after dissolution.
- 1345*a*. Retiring partner may be enjoined from soliciting patronage of firm's customers.
- 1346. Publication of periodical.
- 1347. Vessel not enjoined from sailing.
- 1348. Violation of agreement for dissolution.
- 1349. Publication of letters after dissolution.
- 1349*a*. Insane partner enjoined from interfering with business of firm.

§ 1342. **Injunction pending action for dissolution.** In an action for a dissolution of a partnership the court may, upon proper showing, restrain any member of the firm from improper interference with the business, or from committing any damage to the property of the firm.<sup>1</sup> Thus, one member may be enjoined from collecting any debts due the copartnership, or from accepting or negotiating bills of exchange for other than partnership purposes.<sup>2</sup> And the court may even restrain one partner from using the firm name in any manner in drawing or indorsing commercial paper, or in accepting bills of exchange.<sup>3</sup> And where, upon a dissolution, one of the partners takes all of the property and assets, agreeing to pay all of the debts, and to hold the other partner harmless on account thereof, but afterward becomes insolvent and threatens to dispose of the property for his own benefit, leaving the debts unpaid, he may be enjoined at the suit of the creditors from doing the acts threatened.<sup>4</sup>

<sup>1</sup> Crockford v. Alexander, 15 Ves., 441; Williams v. Bingley, 2 Vern., 138; Smith v. Jeyes, 4 Beav., 278, note.

503; Marshall v. Watson, 25 Beav., 501. <sup>3</sup> Jervis v. White, 7 Ves., 413; Hood v. Aston, 1 Russ., 412.

<sup>2</sup> Read v. Bowers, 4 Bro. C. C., 400. <sup>4</sup> Deveau v. Fowler, 2 Paige, 400.

§ 1343. **Agreements not to continue firm business.** Agreements by one or more of the retiring members, on the dissolution of a firm, not to carry on the firm business, may be enforced in equity by enjoining any attempt at their violation. Such agreements are not to be construed as in restraint of trade generally, nor are they in contravention of public policy, and, there being no adequate remedy at law for their violation, a court of equity is the proper tribunal to afford relief.<sup>5</sup> Thus, where one of several partners engaged in the carrying trade purchases the interest of all the others in the assets and good-will of the business, they agreeing in writing not to do anything which will impair or injure the good-will of the trade, equity will enjoin them from taking any steps tending to draw away the business to themselves. In such a case, the injury being a constantly recurring one, the damages sustained are not susceptible of accurate computation, and an action at law would afford no adequate redress for the loss sustained.<sup>6</sup>

§ 1344. **Urgent necessity must be shown; illustrations.** While the objections to the interference of equity by injunction in partnership cases are less strong after dissolution than before, yet even then some urgent and pressing necessity must be shown to induce the court to sustain an injunction. And where the partner against whom the injunction is sought has the legal right to the partnership property, in accordance with the terms of the contract of dissolution, an injunction will not be sustained to restrain him from the management of the property, the bill containing no allegations of his insolvency.<sup>7</sup> So the fact that a partnership may be unprofitable, and should therefore be dissolved or discontinued, will not warrant a court

<sup>5</sup> *Angier v. Webber*, 14 Allen, 211; *Whittaker v. Howe*, 3 Beav., 383.      <sup>7</sup> *O'Bryan v. Gibbons*, 2 Md. Ch., 9; *Heffebower v. Buck*, 64 Md., 15, 20 Atl., 991. And see *Drury v.*

<sup>6</sup> *Angier v. Webber*, 14 Allen, 211.      *Roberts*, Ib., 157.

in enjoining one of the partners from proceeding with the business and settling up the firm affairs.<sup>8</sup> And to justify an injunction as to funds in the hands of a defendant partner, in an action for the settlement of partnership affairs, it should appear that there is danger that the money will ultimately be lost to the plaintiff. And when it is not shown that defendant is insolvent, or that there is any danger of ultimate loss to the plaintiff, the injunction should not be allowed.<sup>9</sup>

§ 1345. **Firm name and good-will after dissolution.** The right to use the firm name may be regarded as one of the partnership assets, and if upon a dissolution one member of the firm purchases the entire business, the name is regarded as passing with the other assets, and the retiring partner may be restrained from its use,<sup>10</sup> or from the use of a name so similar as to result in the likelihood of deception.<sup>11</sup> And a surviving partner, having the right to use the firm name of the partnership, may, if he has not abandoned the right, restrain the executor of the deceased partner from using the name for his own benefit.<sup>12</sup> Indeed, the good-will and firm name of a partnership constitute so important a part of the firm assets as to be entitled to the protection of equity by injunction. And the appropriation by one partner of a firm name so closely imitating that of the original as to mislead purchasers and divert trade from the original firm may be enjoined. And the defendant may, in such case, be enjoined from the use of his own name in such manner as to mislead the public and injure the good-will of the firm; and this may be done, notwithstanding the bankruptcy of the firm and the appointment of a receiver, since it is necessary to preserve the good-

<sup>8</sup> *Moses v. O'Neill*, 8 C. E. Green, 207. See also *Woodward v. Schatzell*, 3 John. Ch., 412. *Co. v. Payne*, 50 Ohio St., 115, 33 N. E., 88, 19 L. R. A., 82.

<sup>9</sup> *Wellman v. Harker*, 3 Ore., 253. *Myers v. Kalamazoo Buggy Co.*, 54 Mich., 215, 19 N. W., 961, 20 N. W., 545.

<sup>10</sup> *Banks v. Gibson*, 34 Beav., 566; *Townsend v. Jarman*, 69 L. J. N. S. Ch., 823; *Brass & Iron Works* <sup>12</sup> *Lewis v. Langdon*, 7 Sim., 422.

will and name as part of the firm assets.<sup>13</sup> So upon a sale of the good-will of a partnership business in conducting an insane hospital, the court may, for the purpose of giving efficacy to such sale, allow either of the partners to purchase, and may enjoin all save the purchaser from conducting the same business in that locality.<sup>14</sup> So when upon the dissolution of a partnership the retiring partner sells to the other all the firm property, but without mention of the good-will, neither the continuing partner nor his assignee will be permitted to so use the old firm name as to give third persons reason to believe that the retiring partner is still connected with the business, when this would be injurious to him in his business; and the retiring partner, in such case, is entitled to be protected by injunction.<sup>15</sup> And an injunction will be granted after the dissolution of the firm to restrain the retiring partner from entering upon the place of business of the former partnership and from attempting to receive and collect money from the patrons of the business.<sup>16</sup>

§ 1345 *a*. **Retiring partner may be enjoined from soliciting patronage of firm's customers.** Upon similar principles, where one partner sells out to another his interest in the firm and in the good-will of the business and retires from the partnership, there is an implied obligation upon his part not to solicit the trade and patronage of the customers of the old firm, and an injunction is the appropriate remedy to restrain the breach of such obligation. Thus, a partner who is about to retire may be enjoined from taking from the partnership books a list of the firm's customers for the purpose of soliciting their patronage after the dissolution of the firm.<sup>17</sup> So the retiring partner who has sold his interest to his associate

<sup>13</sup> *Bininger v. Clark*, 60 Barb., 113; S. C., 10 Ab. Pr. N. S., 264.

<sup>14</sup> *Williams v. Wilson*, 4 Sandf. Ch., 380.

<sup>15</sup> *McGowan Co. v. McGowan*, 22 Ohio St., 370.

<sup>16</sup> *De Groot v. Peters*, 124 Cal., 406, 57 Pac., 209, 71 Am. St. Rep.,

91.

<sup>17</sup> *Trego v. Hunt*, App. Cas. (1896), 7, 65 L. J. N. S. Ch., 1, approving *Labouchere v. Dawson*, L.

may be restrained from sending out circular letters seeking to divert from the plaintiff the customers of the old firm.<sup>18</sup> But a partner who has been expelled from the firm for violating the partnership articles, and who has been repaid his share of the capital, will not be enjoined from resuming business upon his own account and from soliciting the customers of the old firm, in the absence of any contract binding him not to resume.<sup>19</sup>

§ 1346 **Publication of periodical.** It is also held, upon principles analogous to those above stated, that when a firm of partners are owners and proprietors of a periodical, the retiring partner has no right, upon a dissolution of the firm, to announce by advertisement that the periodical will be discontinued, although he may announce that it will be discontinued as regards himself. And in such a case, the retiring partner undertaking to limit his advertisement or announcement so that it shall only announce the discontinuance of the publication as regards himself, the court may decline to make any order respecting the injunction.<sup>20</sup>

§ 1347. **Vessel not enjoined from sailing.** Upon a bill by the owner of a fractional interest in a ship, praying an account and a dissolution of the partnership, a court of equity will not by injunction prevent the vessel from sailing when the object of the suit is, in effect, to compel defendant to give security to abide the decree in the cause, but will leave the party aggrieved to pursue his remedy in admiralty.<sup>21</sup>

§ 1348. **Violation of agreement for dissolution.** When two partners enter into an agreement that the firm shall be dis-

R. 13 Eq., 322, and overruling *Pearson v. Pearson*, 27 Ch. D., 145, and cited with approval and followed in *Ranft v. Reimers*, 200 Ill., 386, 65 N. E., 720, 60 L. R. A., 291, which, however, was not a partnership case.

<sup>18</sup> *Gillingham v. Beddow*, 69 L. J. N. S. Ch., 527.

<sup>19</sup> *Dawson v. Beeson*, 22 Ch. D., 504. See also *Pearson v. Pearson*, 27 Ch. D., 145.

<sup>20</sup> *Bradbury v. Dickens*, 27 Beav., 53.

<sup>21</sup> *Hallaran v. Donal*, 9 Ir. Eq., 217.

solved and that the partnership estate, stock and good-will shall be conveyed to receivers, who are to act in the winding up of the firm, an injunction may be allowed to prevent one of such partners from using the firm property and effects for his own exclusive benefit.<sup>22</sup>

§ 1349. **Publication of letters after dissolution.** One member of a copartnership may be enjoined, after a dissolution of the firm, from publishing letters received from his copartner, which were written and received in the course of their partnership business, and pertained to that business, where the purposes of justice do not require the publication. The interference of the court in such case is based upon the principle that the writer of a letter does not transfer the absolute property in or ownership of the letter to the person receiving it, who is only authorized to use it for the purpose for which it was sent, the ownership of the letter still remaining in the writer.<sup>23</sup>

§ 1349 *a*. **Insane partner enjoined from interfering with business of firm.** An injunction may properly be granted to restrain a partner who has been adjudged insane from interfering with the business and assets of the partnership during his insanity.<sup>24</sup>

<sup>22</sup> *Turner v. Major*, 3 Gif., 442. And see *Gee v. Pritchard*, 2

<sup>23</sup> *Roberts v. McKee*, 29 Ga., 161. *Swanst.*, 403.

<sup>24</sup> *J. v. S.*, (1894) 3 Ch., 72.



## III. INJUNCTIONS IN CONNECTION WITH RECEIVERS.

- § 1350. The general doctrine stated.
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§ 1350. **The general doctrine stated.** The extraordinary remedy of equity by injunction in partnership matters is frequently invoked in connection with the appointment of receivers, although the two remedies are not necessarily or always invoked or granted at the same time. In general it may be said that when upon the dissolution of a partnership the members of the firm are unable to agree upon the manner of closing up its affairs, it is the usual practice of courts of equity, with a view to protect the rights of all parties in interest, to exclude all the partners from participating in the business of closing up the firm, and to appoint a receiver for that purpose; and in that event an injunction is proper to prevent a partner from participating in the winding up of the firm.<sup>1</sup> But to warrant a receiver and an injunction in partnership cases such a state of facts must be shown by the plaintiff as, if proved at the hearing, will entitle him to a decree for a dissolution of the firm. And in determining whether the conduct of one partner has been such as to entitle the other to a dissolution, in passing upon an application for an injunction and a receiver, the court will consider not merely the specific terms of the contract of partnership, but also the duties and obligations which are implied in every such undertaking. And

<sup>1</sup> Van Rensselaer v. Emery, 9 How. Pr., 135.

if it is manifest that the conduct of the defendant partner has been so injurious to the firm and so inconsistent with his duties as a partner as to entitle plaintiff to a dissolution, a receiver and an injunction will be allowed.<sup>2</sup> But, although an interlocutory injunction has been granted, *ex parte*, upon a bill by one partner seeking a dissolution, it does not necessarily follow that a receiver will be appointed over the affairs of the firm. And if the court is satisfied that such a case is not presented as to entitle plaintiff to a final dissolution it will refuse to appoint a receiver, notwithstanding such injunction, leaving the injunction to be dissolved in due time and upon proper motion.<sup>3</sup>

§ 1351. **Serious disagreement between partners.** The fact that the conduct of the defendant partner has been such as to destroy the mutual confidence which ought to subsist between partners is an important element influencing the court in granting relief by an injunction and a receiver in partnership cases.<sup>4</sup> And when the pleadings disclose a serious and apparently irreconcilable disagreement between the partners as to the control and disposition of their property and effects, and as to their respective demands against each other, the appointment of a receiver and allowing an injunction are regarded as a provident exercise of the powers of a court of equity, sanctioned alike by authority and by the exigencies of the case.<sup>5</sup> So when it is apparent that the defendant partner has deliberately resolved to break up and ruin the firm business, and the personal relations of the partners are such that they can not carry on business with advantage to each other, sufficient cause is presented for an injunction and a receiver.<sup>6</sup>

§ 1352. **Limitations upon the general doctrine.** The appointment of receivers in partnership cases depends largely

<sup>2</sup> *Smith v. Jeyes*, 4 Beav., 503.

30. See also *Shannon v. Wright*,

<sup>3</sup> *Garretson v. Weaver*, 3 Edw. 60 Md., 520.

Ch., 385.

<sup>6</sup> *Sutro v. Wagner*, 8 C. E. Green,

<sup>4</sup> *Smith v. Jeyes*, 4 Beav., 503. 388.

<sup>5</sup> *Whitman v. Robinson*, 21 Md.,

upon the special circumstances of each particular case, and it is difficult to lay down any rules of general application. It does not necessarily follow that because a partnership has been dissolved and because a partner is entitled to an accounting, that he is therefore entitled to an injunction and a receiver; but there must be some actual abuse of the rights of a copartner, or of the partnership property, before a court of equity will interfere. And in the case of a dissolution by the sale of the interest of one partner under an execution against him individually, the court will be governed by the same rule, in interfering with the other partner, as in case of a dissolution by death; and the injunction will not be allowed if the equities do not clearly warrant it.<sup>7</sup>

§ 1353. **Insolvency of defendant; want of confidence.** Upon a bill between partners for a settlement of the affairs of the partnership, after a dissolution, the insolvency of the defendant will warrant the court in granting an injunction and appointing a receiver for the protection of complainant. The insecurity of the partnership assets in such a case, if left in the control of an insolvent member of the dissolved firm, affords strong ground for equitable relief.<sup>8</sup> And where, through the improper conduct of one of two partners, such a want of confidence exists between them as is sufficient to warrant the court in dissolving the partnership, a receiver may be appointed and an injunction allowed, the injunction in such case following the receiver almost as a matter of course.<sup>9</sup>

§ 1354. **How far injunction dependent upon receivership.** The continuance of an injunction granted to preserve partnership property from waste, pending an application for the appointment of a receiver, must depend upon the fate of such application, and if the receiver is denied the injunction

<sup>7</sup> *Renton v. Chaplin*, 1 Stockt., 62. See also *Hefebower v. Buck*, 64 Md., 15, 20 Atl., 991.

<sup>8</sup> *Randall v. Morrell*, 2 C. E. Green, 343.

<sup>9</sup> *Seighortner v. Weissenborn*, 5 C. E. Green, 172.

must be dissolved.<sup>10</sup> But the injunction being regarded as auxiliary to the appointment of a receiver, upon the removal of the receiver and the appointment of another, the injunction originally allowed will be continued as of course.<sup>11</sup>

§ 1355. **Illustrations of the relief.** The fact that one partner has failed to contribute his share to the capital stock of the firm, as agreed by the copartnership articles, and that he sells his interest in the firm to a third person without the knowledge and consent of the other partner, and refuses to pay any portion of the firm indebtedness, coupled with his insolvency and the fact that the purchaser has taken possession of the firm assets and excludes the other partner therefrom, will warrant the granting of an injunction and the appointment of a receiver to take charge of the firm assets.<sup>12</sup> And where a partnership is formed merely at will, to be dissolved at the pleasure of either party, and it does in fact become dissolved by the insolvency of some of its members, an attempt by the insolvent partners to appropriate the firm assets to the payment of their private debts by an assignment thereof for the benefit of their creditors affords sufficient ground to entitle the remaining partners to an injunction and a receiver. And in such case, the receivership and the injunction should extend to and cover all the firm assets in the hands of the defendant partners and the assignee, in order to prevent their misappropriation.<sup>13</sup>

§ 1356. **Administrator of deceased partner allowed relief.** In the case of a partnership dissolvable at will, there being no partnership articles and no provision for a continuation of the business by the administrators or representatives of a deceased partner, upon the death of one member of the firm if the surviving partner refuses to proceed within a reasonable time to close up the affairs of the firm, continuing the business mean-

<sup>10</sup> Walker v. House, 4 Md. Ch., 39.

<sup>12</sup> Heathcot v. Ravenscroft, 2

<sup>11</sup> Williamson v. Wilson, 1 Bland, Halst. Ch., 113.

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<sup>13</sup> Davis v. Grove, 2 Rob. (N. Y.), 134; Same v. Same, Ib., 635.

while in his own name and for his own benefit, upon a bill by the administrator of the deceased partner a court of equity will enjoin such continuation of the business and appoint a receiver over the firm affairs.<sup>14</sup>

§ 1357. **Partnership in farm; sawing lumber.** Where plaintiffs, the owners of a farm, enter into an agreement in the nature of a partnership with defendant to work the farm and divide the profits, with a provision that plaintiffs may terminate the partnership on six months' notice if the profits do not reach a given amount, upon showing that the farm has not paid the amount agreed upon, plaintiffs are entitled to an injunction and a receiver to wind up the affairs of the partnership.<sup>15</sup> So when a partnership is formed for the purpose of sawing lumber, and by the articles of agreement the partner having charge of the business is to take the timber used at the mill from land belonging to his copartner, a violation of this agreement constitutes such a breach of duty as to justify an injunction and a receiver, when the business is shown to be in a losing condition and the indebtedness of the firm increasing.<sup>16</sup>

§ 1358. **Misconduct of defendant.** In an action for the settlement of partnership accounts, although there may be some dispute as to whether property in possession of a defendant partner is really firm property, yet when it sufficiently appears that it was received in part payment for a sale of partnership property, and plaintiff shows that defendant is insolvent and has acted in bad faith, and that he has disposed of part of the property with intent to defraud the firm creditors, sufficient cause is shown for an injunction and a receiver, leaving defendant to show, if he can, in the further stages of the cause, that the property in question is his individual property.<sup>17</sup>

§ 1359. **Receiver not enjoined from managing property.** When the appointment of a receiver over a partnership, upon

<sup>14</sup> *Holden's Administrators v. McMakin*, 1 Par. Eq. Cas., 270.

<sup>15</sup> *Dunn v. McNaught*, 38 Ga., 179.

<sup>16</sup> *New v. Wright*, 44 Miss., 202.

<sup>17</sup> *Saylor v. Mockbie*, 9 Iowa, 209.

proceedings under judgments against the firm, has become perfected by his giving the required security, such receiver becomes at once entitled to possession of the partnership effects; and the assets thus in his possession are deemed to be in the custody of the court, and will not be disposed of without a hearing of all parties in interest. It is improper, therefore, to enjoin such receiver from the management of the property or fund, since this would in effect restrain the court itself from disposing of the funds which might come into the hands of its officers.<sup>18</sup>

<sup>18</sup> *Van Rensselaer v. Emery*, 9 How. Pr., 135.

## CHAPTER XXIV.

### OF INJUNCTIONS PERTAINING TO EXECUTORS AND ADMINISTRATORS.

- § 1360. Jurisdiction exercised for protection of estate; when sales enjoined.
- 1361. Improper distribution; suit enjoined; insolvency.
- 1362. Defective execution of power.
- 1363. Judgment against administrator, when enjoined.
- 1364. Illustrations of the jurisdiction.
- 1365. Execution against administrator, when enjoined.
- 1366. Fraud by administrator or executor.
- 1367. Relief in behalf of heirs at law.
- 1368. The jurisdiction not favored.
- 1369. Injunctions against judgments.
- 1370. Judgment against legatee, when enjoined.
- 1371. Second administrator's sale enjoined.
- 1372. Injunction denied when other relief available.
- 1373. Injunction refused against executor's sale.
- 1374. Sale of legacies under execution enjoined.

§ 1360. **Jurisdiction exercised for protection of estate; when sales enjoined.** The granting of injunctions for or against executors and administrators is based upon principles of a purely equitable nature, and the jurisdiction is generally exercised for the protection of the estate to be administered, although it may, as we shall hereafter see, be allowed for the protection of the executor or administrator personally. It may be said, generally, that proceedings by an administrator without due and sufficient authority may be enjoined at the suit of the next of kin. Thus, where an administrator is proceeding without proper authority to sell the effects of his intestate, an injunction is the proper remedy.<sup>1</sup> And when an executor, having a power of sale under the will, is proceeding to sell real estate for the payment of demands against the estate which are

<sup>1</sup> *Lawrence v. Philpot*, 27 Ga., 585.

barred by the statute of limitations, plaintiffs who have succeeded to the testator's title may enjoin such sale upon the ground of preventing a cloud upon their title.<sup>2</sup> And an administrator's sale of real property for the payment of debts has been enjoined when there had been a delay of many years in procuring an order to sell after the granting of administration.<sup>3</sup> So a widow has been allowed to enjoin executors of the estate from selling property to which the widow was entitled as her award, under the laws of the state.<sup>4</sup> But an executor will not be restrained from selling at the suit of creditors in the absence of any allegation of waste or mismanagement.<sup>5</sup> And creditors of a deceased can not enjoin the sale of real estate by an administrator for the payment of debts upon the ground that the claims are fictitious and fraudulent, where the creditors have failed to file their claims in the probate court as required by law; nor is the fact that the time has elapsed in which they may thus be filed sufficient to excuse them.<sup>6</sup>

§ 1361. **Improper distribution; suit enjoined; insolvency.**

Where executors refuse to distribute the estate ratably among the creditors, according to the terms of the devise, and threaten to secure certain favored creditors who are entitled to no preference, either at law or in equity, an injunction may be allowed to prevent them from making such a disposition of the estate.<sup>7</sup> And where a non-resident and insolvent executor is seeking by suit in the common law courts to obtain possession of a fund belonging to the estate, he may be enjoined from proceeding with his suit upon a strong showing of danger of his wasting or misapplying the fund.<sup>8</sup> But it is to be observed that insolvency of the executors is not of itself sufficient cause to warrant a court of equity in restraining them from a sale

<sup>2</sup> *Butler v. Johnson*, 111 N. Y., 204, 18 N. E., 643.

<sup>3</sup> *Gunby v. Brown*, 86 Mo., 253.

<sup>4</sup> *Denny v. Denny*, 113 Ind., 22, 14 N. E., 593.

<sup>5</sup> *Elam v. Elam*, 72 Ga., 162.

<sup>6</sup> *Strauss v. Phillips*, 189 Ill., 9, 59 N. E., 560.

<sup>7</sup> *Depau v. Moses*, 3 Johns. Ch., 349.

<sup>8</sup> *Dougherty v. Walker*, 15 Ga., 442.



of the property, and thereby taking the administration of the estate out of their hands.<sup>9</sup>

§ 1362. **Defective execution of power.** The defective execution of the powers conferred upon administrators constitutes ground for relief in equity in favor of *bona fide* purchasers for valuable consideration. Thus, the heirs of a deceased person may be enjoined from prosecuting an action of ejectment for the recovery of real estate sold by the administrators of the estate, the only foundation for the action being the omission of one of the two administrators to join in the conveyance. The sale having been consummated and the purchase money paid in good faith, the purchaser is entitled to the aid of equity to relieve against the defective conveyance.<sup>10</sup>

§ 1363. **Judgment against administrator, when enjoined.** An injunction has been allowed in behalf of an administrator to restrain the enforcement of a judgment against him, where, subsequent to the rendering of the judgment, he has discovered set-offs and credits to which his intestate was entitled, but of which the administrator was ignorant when the judgment was obtained.<sup>11</sup> And where, on the application of an administrator, an injunction has been allowed to restrain a judgment recovered against him in his capacity of administrator, it may be continued until such time as sufficient assets shall come into his hands to satisfy the judgment, or any part thereof, reserving to the judgment creditor the right to show such assets by *sci. fa.*<sup>12</sup> And where the insolvent next of kin of a deceased procures a judgment against the executor for funds for which the latter has failed to account, the administrator *de bonis non* may enjoin the collection of such judgment by such next of kin where there are outstanding claims against the estate.<sup>13</sup>

<sup>9</sup> Schanck v. Executors of Schanck, 3 Halst. Ch., 140.

<sup>12</sup> Haydon v. Goode, 4 Hen. & Munf., 460.

<sup>10</sup> Wortman v. Skinner, 1 Beas., 358.

<sup>13</sup> Brice v. Taylor, 51 Ark., 75, 9 S. W., 854.

<sup>11</sup> Terril's Adm'rs v. Southall's Ex'r, 3 Bibb, 458.

§ 1364. **Illustrations of the jurisdiction.** An executor who has rendered himself personally liable at law will not be protected in equity against a judgment at law for such liability.<sup>14</sup> Courts of equity will not, however, permit their own decrees to be interfered with, and to prevent this they will, under proper circumstances, exercise their undoubted jurisdiction by injunction for their own protection.<sup>15</sup> Thus, a decree requiring an administrator to render an account will be protected by injunction; and such a decree being for the benefit of all the creditors, and in the nature of a judgment for them all, the relief will be allowed on the application of either party to restrain proceedings at law by any of the creditors against the administrator, instituted after the date of the decree.<sup>16</sup>

§ 1365. **Execution against administrator, when enjoined.** Equity exercises control over matters affecting the administration of estates by virtue of its original jurisdiction, notwithstanding such matters have been committed by statute to other tribunals, unless its jurisdiction has been expressly withdrawn. It is, therefore, proper for a court of equity to enjoin the enforcement of an execution *de bonis propriis* against an administrator, after the estate of the decedent has become insolvent and has been so declared by the proper probate court.<sup>17</sup> And it constitutes no defense to a bill filed for such purpose that the insolvency of the estate was caused by the neglect of the administrator to collect assets, such a question being properly referable to the probate court, which is the appropriate tribunal for determining questions relating to the misconduct of the administrator.<sup>18</sup>

<sup>14</sup> *Burles v. Popplewell*, 10 Sim., 383.

<sup>15</sup> *Brooks v. Dent*, 4 Md. Ch., 473; *Burles v. Popplewell*, 10 Sim., 383.

<sup>16</sup> *Brooks v. Dent*, 4 Md. Ch., 473. And see *Thompson v. Brown*, 4 Johns. Ch., 619.

<sup>17</sup> *Lambert v. Mallett*, 50 Ala., 73; *Balkum v. Harper's Adm'r*, 50 Ala., 429.

<sup>18</sup> *Balkum v. Harper's Adm'r*, 50 Ala., 429.

§ 1366. **Fraud by administrator or executor.** Fraudulent and collusive conduct upon the part of an administrator, to the injury of the estate which he represents, may justify the interference of equity by an injunction restraining his fraudulent proceedings.<sup>19</sup> Thus, where an administrator, colluding with other persons, has entered into a conspiracy to procure a sale of the property pertaining to the estate for their joint benefit, the administrator having allowed fraudulent claims against the estate, to satisfy which he procures an order for the sale of real estate, he may be enjoined from proceeding with the sale at the suit of persons claiming the ownership of such real estate; although, in such case, the court will only enjoin the sale, without attempting to annul or set aside the order of the probate court.<sup>20</sup> So when an administrator is sued in a court having no jurisdiction over him, but he accepts service and permits judgment to go against him by default, upon an old account against the deceased, which has been barred by the statute of limitations, sufficient ground is shown for relief in equity by a bill to enjoin the judgment at the suit of sureties upon the administrator's bond, they having sufficient interest in the matter to warrant them in proceeding in equity to have the judgment set aside.<sup>21</sup> So a creditor of an estate who has duly proven his claim, which has been allowed by the proper court of probate, is entitled to an injunction to restrain the executor, who is also a mortgagee under a chattel mortgage executed to him by the testator to defraud his creditors, from selling under the mortgage, when the estate itself is insolvent and the executor is also insolvent.<sup>22</sup>

§ 1367. **Relief in behalf of heirs at law.** Relief by injunction may also be granted in behalf of the heirs at law against improper conduct on the part of an administrator. For ex-

<sup>19</sup> *Larue v. Friedman*, 49 Cal., 278; *Washington v. Barnes*, 41 Ga., 307.

<sup>22</sup> *Becker v. Anderson*, 6 Neb.,

<sup>20</sup> *Larue v. Friedman*, 49 Cal., 499.

ample, where the heirs have paid all the debts of the deceased except a trifling amount due to a single creditor, and have then partitioned the realty between them, they may restrain a sale by an administrator who, without being requested by the creditor or by the heirs, has obtained administration for the avowed purpose of procuring the land himself.<sup>23</sup> So the grantees of real estate, claiming under a conveyance from the heir at law, are entitled to an injunction to prevent the administrator from making a sale of the real estate in satisfaction of claims against the estate, when the personal property is sufficient for their payment.<sup>24</sup> So the heirs may have an injunction until a final hearing to restrain the administrator from selling realty under a power contained in an instrument purporting to be the will of the deceased, but the validity of which is questioned.<sup>25</sup> And upon a bill by heirs at law against an executor, alleging that defendant's testator had held in trust for plaintiffs certain money, which he had invested in real estate for their benefit, but taking the title in his own name, the bill seeking a conveyance of the premises to plaintiffs, it was held proper to enjoin the executors, until the hearing, from selling the real estate as assets to pay debts of the testator.<sup>26</sup> So where an executor claims under the will and also by gift *inter vivos* from the testator, an injunction may be allowed to restrain him from selling personal property thus claimed, upon a bill charging undue influence by the executor over his testator.<sup>27</sup>

§ 1368. **The jurisdiction not favored.** It is not, however, to be inferred that the granting of relief by injunction against an executor is a favorite branch of the jurisdiction of equity by injunction. Indeed, a court of equity is ordinarily averse

<sup>23</sup> Owens, Adm'r, v. Childs, 58 Ala., 113.

<sup>26</sup> McCorkle v. Brem, 76 N. C., 407.

<sup>24</sup> Hill v. Mitchell, 40 Mich., 389.

<sup>27</sup> Edmunds v. Bird, 1 Ves. & E.,

<sup>25</sup> Galbreath v. Everett, 84 N. C., 542.  
546.

to granting an injunction in the first instance against an executor, since its effect is wholly to suspend his powers and to prevent him from further acting in the management of the trust.<sup>28</sup> And it would seem that mere irregularities in the appointment of an administrator afford no ground for enjoining him from a sale of property in satisfaction of debts.<sup>29</sup> And while equity frequently interferes for the protection of assets pending litigation in the proper court as to the right to administer, yet when such court has duly appointed administrators and they are legally and equitably entitled to the assets, equity will not enjoin them from dealing therewith upon the application of the next of kin.<sup>30</sup>

§ 1369. **Injunctions against judgments.** An executor will not ordinarily be allowed to enjoin a sale of real estate of the testator in satisfaction of a judgment obtained against him in his life-time.<sup>31</sup> Nor can an administrator enjoin the levy of an execution under a judgment against his intestate upon real estate of the intestate, when it is not shown that the administrator will be injured in his representative capacity by the sale of such real estate, or that it will be necessary to sell it for the payment of debts.<sup>32</sup> And an executor who seeks to enjoin the enforcement of a judgment against himself upon the ground of an understanding with the creditor to look to the testator's assets, and not to the executor personally, can not have such injunction upon motion in the administration suit, but must institute a new suit for that purpose.<sup>33</sup> Where, however, the consideration of a note has failed by the payee's

<sup>28</sup> *Boyd v. Murray*, 3 Johns. Ch., 48.

<sup>29</sup> *Ducote v. Bordelon*, 24 La. An., 145.

<sup>30</sup> *Maher v. Gorman*, 6 Ir. Eq., 304. As to the right to enjoin an executor from receiving assets, pending a contest in the ecclesiastical court for the purpose of re-

calling probate of the will, see *Watkins v. Brent*, 1 Myl. & Cr., 97, affirming S. C., 7 Sim., 512; *Connor v. Connor*, 15 Sim., 598.

<sup>31</sup> *Redd v. Blandford*, 54 Ga., 123.

<sup>32</sup> *Edwards v. Haverstick*, Adm'r, 47 Ind., 138.

<sup>33</sup> *Lucas v. Williams*, 4 DeGex, F. & J., 436.

own act in breach of his contract, equity may properly enjoin proceedings by the administrator of the payee for the enforcement of the note.<sup>34</sup>

§ 1370. **Judgment against legatee, when enjoined.** If the executors of an estate are proceeding to collect a judgment against one who is a legatee of the testator to an amount larger than the judgment, it is proper to enjoin them from proceeding when they are insolvent and unable to respond to the legatee for the amount of his demand.<sup>35</sup>

§ 1371. **Second administrator's sale enjoined.** Where an administrator in chief sells land belonging to the deceased pursuant to an order of the probate court, and the purchase money is paid and applied as assets of the estate, and an administrator *de bonis non* subsequently attempts to sell the same lands, such attempted sale operates as such a fraud upon the purchaser under the former sale as to entitle him to the aid of an injunction against the threatened sale.<sup>36</sup>

§ 1372. **Injunction denied when other relief available.** A court of equity will not, however, enjoin an administrator from proceeding to sell lands of the intestate when full relief against the proposed sale may be had in the proper probate court.<sup>37</sup> Nor can the judgment of such court in ordering a sale be questioned collaterally in a suit for an injunction.<sup>38</sup> And an injunction has been refused against an executor, whom it was sought to restrain from receiving payment for lands sold and from making conveyance thereof upon the ground of misconduct, when the parties aggrieved could have ample

<sup>34</sup> *Ewing v. Chase*, Adm'r, 2 Del. Ch., 278.

<sup>35</sup> *Dobbs v. Prothro*, 57 Ga., 14.

<sup>36</sup> *Bell v. Craig*, Adm'r, 52 Ala., 215.

<sup>37</sup> *Johnson v. Jones*, 75 N. C., 206; *Bailey v. Ross*, 68 Ga., 735. But see, *contra*, *McCook v. Pond*, 72 Ga., 150, where it is held that

upon a bill to wind up the affairs of an estate and for an accounting and distribution, a sale of realty by the administrator under an order of the ordinary may be restrained when unnecessary and when the estate is ready for distribution.

<sup>38</sup> *Bailey v. Ross*, 68 Ga., 735.

relief in the probate court.<sup>39</sup> And a creditor of a decedent can not restrain the administrator from acting as such upon the alleged ground that he obtained his appointment by falsely representing himself to be a creditor of the estate, where there is an ample remedy by applying to the probate court to have the letters of administration revoked.<sup>40</sup> And, although a statute confers equity powers upon a probate court concurrent with those of courts of equity, such a probate court will not, under such powers, enjoin the administrator from acting as such, where there is an adequate remedy by petition to vacate the appointment of the administrator.<sup>41</sup> So creditors of a deceased testator who, under the laws of the state, may contest priority of claims against the estate after judgment as well as before, will not be allowed to enjoin other creditors from obtaining judgment against the executor.<sup>42</sup>

§ 1373. **Injunction refused against executor's sale.** The fact that a sale of real estate under a deed of trust in the nature of a mortgage has been enjoined affords no reason why an executor of the deceased mortgagor should be enjoined from making an executor's sale of the premises, or of the interest of the deceased therein, such executor's sale being made *pendente lite* and subject to the lien of the prior deed of trust.<sup>43</sup>

§ 1374. **Sale of legacies under execution enjoined.** Legacies in the hands of an administrator with the will annexed, pending the settlement of the estate of the deceased, are not subject to levy and sale under execution against the legatee; and the administrator may, therefore, under such circumstances, enjoin the sale.<sup>44</sup>

<sup>39</sup> *Sprinkle v. Hutchinson*, 66 N. C., 450.

<sup>42</sup> *Turk v. Ross*, 59 Ga., 378.

<sup>43</sup> *George v. Cooper*, 15 West Va.,

<sup>40</sup> *Strauss v. Phillips*, 189 Ill., 9, 666.

59 N. E., 560.

<sup>44</sup> *Stout v. La Follette*, 64 Ind.,

<sup>41</sup> *Bennett v. Kimball*, 175 Mass., 365.  
199, 55 N. E., 893.

## CHAPTER XXV.

### OF INJUNCTIONS PERTAINING TO SURETIES.

- § 1375. General rule and its applications.
- 1376. Foundation of the rule.
- 1377. Accommodation indorser.
- 1378. Insolvency of principal; removal of mortgaged property; fraudulent judgment.
- 1379. Effect of statute.
- 1380. Surety in replevin.
- 1381. Judgments against sureties.
- 1382. The same.
- 1383. Ignorance of defense at law.
- 1384. Judgment upon note not merged in that upon injunction bond.
- 1385. Contribution.
- 1386. When suit enjoined; discharge of mortgage by co-surety; equitable defenses.

§ 1375. **General rule and its applications.** The appropriate remedy for the protection of sureties, who have been discharged from their liabilities, is by injunction to restrain proceedings at law against them on account of the suretyship.<sup>1</sup> And it is a rule of general application, that wherever the relation of the surety to the debtor is changed without his consent, as by giving the principal debtor an extension of the time of payment unknown to the surety, the latter is thereby discharged in equity, and may perpetually enjoin the creditors from proceeding at law against him for the collection of the debt.<sup>2</sup> Thus, a creditor who enters into an agreement with his principal debtor for forbearance to sue thereby discharges the sureties of the debtor, and if he proceeds to obtain a judgment

<sup>1</sup> *Samuell v. Howarth*, 3 Meriv., 540; *Boulthée v. Stubbs*, 18 Ves., 272; *Allan v. Inman*, 7 Jur., 433. 20; *Bradshaw v. Combs*, 102 Ill.,

<sup>2</sup> *Clark v. Henty*, 3 Y. & C., 187; 428. And see *King v. Baldwin*, 2 Armistead v. Ward, 2 Pat. & H., Johns. Ch., 554. 504; *Rees v. Berrington*, 2 Ves. Jr.,



against the sureties before they have been notified of the contract of forbearance, the judgment will be perpetually enjoined on the application of the sureties.<sup>3</sup> So if the creditor fraudulently aids the principal debtor in absconding, with intent thereby to hinder the surety in his remedy against the principal, the creditor will be enjoined from collecting his debt of the surety.<sup>4</sup>

§ 1376. **Foundation of the rule.** The rule as above stated is founded in the plainest principles of equity and reason. The surety has the right to insist on a strict performance of the contract to which he has become a party, and he can not be bound by any obligation to which he has not given his consent.<sup>5</sup> A binding and valid contract of forbearance, made by the creditor with his debtor without the surety's consent, by depriving the surety of the right of immediate recourse against his principal debtor, takes away from him the protection to which he is entitled, and deprives him of the equity which he has a right to demand.<sup>6</sup> Nor does the fact that the contract for indulgence is clearly for the benefit of the surety vary the application of the rule, since the surety himself is the proper person to determine whether he is to be benefited thereby.<sup>7</sup>

§ 1377. **Accommodation indorser.** Upon the principles above laid down the protection of equity has been extended to the case of an accommodation indorser standing in the position of a surety. Thus, where the makers of a promissory note, in a suit prosecuted to a court of final resort, are held not liable on the ground of illegality of consideration, an indorser for accommodation will be allowed to enjoin a

<sup>3</sup> *Armistead v. Ward*, 2 Pat. H., 504.

<sup>4</sup> *Smith v. Hays*, 1 Jones Eq., 321.

<sup>5</sup> *Samuell v. Howarth*, 3 Meriv., 272; *Bonser v. Cox*, 13 L. J. Ch., 260; *Newton v. Chorlton*, 10 Hare, 649.

<sup>6</sup> *Rees v. Berrington*, 2 Ves. Jr., 540; *Boulton v. Stubbbs*, 18 Ves.,

20; *Newton v. Chorlton*, 10 Hare, 649.

<sup>7</sup> 2 Story's Eq., § 883; *Samuell v. Howarth*, 3 Meriv., 272; *Calvert v. London*, 2 Keen, 638.

judgment obtained against him on the same note, on the ground that the principal being discharged, the surety should also be discharged, even though he has not used due diligence in defending against the action at law.<sup>8</sup> The rule is to be understood as limited to cases where the agreement for forbearance is founded upon sufficient consideration, and is in its nature such an agreement as the debtor might enforce against the creditor.<sup>9</sup> And where a surety has entered into a bond for the performance by his principal of two separate things, a subsequent variation from the terms of the contract as to one of those things, without the surety's consent, does not release him from his obligation as to the other.<sup>10</sup> Nor will the taking of additional security from the debtor operate as a discharge of the surety, unless taken in place of the original security.<sup>11</sup>

§ 1378. **Insolvency of principal; removal of mortgaged property; fraudulent judgment.** Insolvency of the principal debtor, against whom a judgment has been obtained, and the fact of his having, after the rendition of the judgment, sold property which the purchaser is about to remove from the county, afford sufficient ground for enjoining the removal of the property at the suit of the surety, even although he has not yet been compelled to pay the judgment.<sup>12</sup> So sureties upon an official bond, upon showing that their principal will be in default, and that property mortgaged to them to secure them on account of their suretyship is in danger of being removed, are entitled to the aid of equity to restrain the removal of the mortgaged property.<sup>13</sup> But a surety upon a promissory note for money borrowed, who is compelled to

<sup>8</sup> *Miller v. Gaskins*, Sm. & M. Ch., 524.

<sup>9</sup> *Blake v. White*, 1 Y. & C., 420; *Armistead v. Ward*, 2 Pat. & H., 504; *Keath v. Key*, 1 Y. & J., 434.

<sup>10</sup> *Harrison v. Seymour*, 1 L. R. C. P., 519.

<sup>11</sup> *Eyre v. Everett*, 2 Russ., 381; *Newton v. Chorlton*, 10 Hare, 649.

<sup>12</sup> *Anderson v. Walton*, 35 Ga., 202.

<sup>13</sup> *Outlaw v. Reddick*, 11 Ga., 669.

pay the note, can not enjoin the principal debtor from collecting dividends from an insolvent bank in which he had deposited the money so borrowed, even though he is alleged to be insolvent, the surety having no lien upon the fund so deposited.<sup>14</sup>

§ 1379. **Effect of statute.** An injunction granted for the purpose of protecting a person from the sale of his property, to satisfy a debt for which he was simply a surety, will not be dissolved because of a statute conferring upon the court out of which the execution issued power to administer equitable relief, where a judgment is recovered against both principal and surety. The court will be governed in such a case by the principle that the conferring of equitable power upon courts of common law neither impairs nor abridges the jurisdiction of equity, but simply creates a case of concurrent jurisdiction.<sup>15</sup>

§ 1380. **Surety in replevin.** Upon the question whether a surety in replevin is entitled to protection by injunction, until the principal debtor is exhausted, the better doctrine is that such a surety is not entitled to an injunction to prevent the levy of an execution on his own property until that of his principal debtor shall have first been levied upon, the protection of the surety's property by compelling a levy on that of the principal being a proceeding unsanctioned either by principle or authority.<sup>16</sup> But in Indiana it would seem that a surety in an action of replevin is entitled to enjoin a levy upon his property before that of the judgment debtor is exhausted; although such injunction is not proper unless the officer is actually threatening or is about to levy an execution upon plaintiff's property, and the mere fact that an execution is in his hands is not sufficient to warrant the relief.<sup>17</sup>

<sup>14</sup> *Carlton v. Simonton*, 94 N. C., 401.

<sup>16</sup> *Kilpatrick v. Tunstall*, 5 J. J. Marsh., 80.

<sup>15</sup> *Irick v. Black*, 2 C. E. Green, 189.

<sup>17</sup> *Elson v. O'Dowd*, 40 Ind., 300.

§ 1381. **Judgments against sureties.** Questions of considerable nicety and importance have occurred touching the extent to which equity may relieve by injunction against judgments at law which have been recovered against sureties. The question of good faith and diligence on the part of the judgment creditor may become a controlling element in cases of this nature. Thus, where judgment is obtained against the principal and sureties in an appeal bond, and at the time of recovering such judgment the principal in the bond is solvent and the judgment may be realized, but by the delay, laches and bad faith of the judgment creditor and his assigns, the principal debtor becomes insolvent so that the surety loses his recourse against him for indemnity, the enforcement of the judgment against the surety may be enjoined.<sup>18</sup> So where a judgment creditor, who has procured judgment against a surety, takes out execution against the principal who at the time is solvent but afterward agrees with the latter to postpone making a levy and in the meantime the principal becomes insolvent, the enforcement of the judgment against the surety will be enjoined.<sup>19</sup> So also a surety may enjoin the collection of a judgment obtained against him by the creditor of his principal where the judgment creditor, after levying an execution upon the property of the principal in an amount more than enough to satisfy the judgment, afterward stays the execution without the consent of the surety and permits the principal to sell the property and apply the proceeds to his

<sup>18</sup> *Biggerstaff v. Hoyt*, 62 Mo., 481. And in Kansas, the law of the state requiring a creditor to exhaust the property of the principal before that of the surety, the judgment being entered under the practice of the state so as to show the relation of the parties, it is held that a surety can not restrain the enforcement of a judgment by execution against his property upon

the ground of a prior agreement with the creditor not to collect the judgment from the principal until he had exhausted the surety's property, nor upon the ground that the creditor had delayed execution against the principal until he had become insolvent. *Fox v. Hudson*, 20 Kan., 246.

<sup>19</sup> *Cummings v. Jerman*, 6 Del. Ch., 122, 33 Atl., 622.

own use.<sup>20</sup> And where the holder of a promissory note procures judgment thereon against the maker, levies execution upon his land, and afterward, and without the knowledge or consent of the surety postpones the sale, and the maker then becomes insolvent, the surety may enjoin the creditor from satisfying his judgment out of the property of the former, since the action of the creditor in such case operates as a discharge of the surety.<sup>21</sup> So when a surety has paid the amount due from his principal in full, he may be protected by injunction from the enforcement of judgments upon his recognizance for anything more.<sup>22</sup> So when plaintiff, who is indebted to defendant, becomes his surety upon an appeal bond upon an agreement that his indebtedness to defendant shall be first applied in payment of the judgment which may be recovered against the latter in the appeal suit, and defendant, in violation of this agreement, procures judgment upon his demand against the surety, the enforcement of such judgment may be enjoined.<sup>23</sup> So a surety may enjoin the enforcement of a judgment obtained against him by a creditor of his principal upon the ground that the contract between the principal and the creditor, upon which the judgment is based, is tainted with usury.<sup>24</sup> And the maker of a promissory note who has pledged stock to indemnify the guarantor of the note against loss by reason of the guaranty may enjoin the enforcement against the guarantor of a judgment rendered against him by default and through his neglect, where the plaintiff has a good defense to the note and has been guilty of no fault or

<sup>20</sup> *Hazel v. Sinex*, 6 Del. Ch., 19, 6 Atl., 625.

<sup>21</sup> *Parker v. Nations*, 33 Tex., 210.

<sup>22</sup> *In re Herrick's Minors*, 3 Ir. Ch., 183.

<sup>23</sup> *Mattingly v. Sutton*, 19 West Va., 19. In Georgia it is held that a surety upon promissory notes may enjoin the enforcement of a judgment against him upon the

notes until the determination of the suit against his principal, the undertaking of the surety being only collateral; and this, although the surety has neglected to defend the action. *Norris v. Pollard*, 75 Ga., 358.

<sup>24</sup> *Hazel v. Sinex*, 6 Del. Ch., 19, 6 Atl., 625.

laches and has been diligent in protecting his interests, as by informing the guarantor of the existence of the defense and by offering to employ counsel for him.<sup>25</sup> But an injunction will not lie to restrain a judgment against complainant on a note executed by him as surety, the only equity in support of the bill being that fraudulent representations were made by the principal to obtain the signature of the surety, no fraud or misrepresentation being charged upon the payee.<sup>26</sup> And when plaintiffs seek to enjoin the enforcement of a judgment at law against them, upon the ground that they were only sureties upon the note on which the judgment was rendered, and that plaintiff in that action induced them to consent to judgment by default upon assurances that no execution should issue against them, no sufficient ground for relief is presented.<sup>27</sup>

§ 1382. **The same.** When the holder of a promissory note brings suit against two makers, one of whom occupies the relation of surety to the other, and plaintiff dismisses his suit as to the principal maker, for the purpose of avoiding his plea, and then takes judgment against the surety, the effect being to prevent the surety from recovering against the principal, the note being barred by the statute of limitations, such equities are presented as to warrant an injunction in behalf of the surety to restrain the enforcement of the judgment against him.<sup>28</sup>

§ 1383. **Ignorance of defense at law.** A surety, however, will not be allowed to rely upon his ignorance of a substantial defense to an action at law against him as surety, resulting out of transactions between the plaintiff in such action and

<sup>25</sup> *Bradshaw v. Miners' Bank*, 26 C. C. A., 673, 81 Fed., 902.

<sup>26</sup> *Griffith v. Reynolds*, 4 Grat., 46.

<sup>27</sup> *Mitchell v. Boyer*, 58 Ind., 19.

See, as to circumstances under which a surety may enjoin the en-

forcement of a judgment against him until another security for the same debt has been exhausted, *Meade v. Grigsby's Adm'rs*, 26

Grat., 612.

<sup>28</sup> *Turner v. McCarter*, 42 Ga., 491.

the principal debtor, as a ground for enjoining the judgment against him, unless he avers in his bill and satisfactorily proves that he took proper steps to ascertain the true state of the case and to prepare his defense in the action at law, or that he was prevented by circumstances which rendered it impossible for him so to do.<sup>29</sup> And a surety upon a bond given in the course of judicial proceedings, upon which judgment has been rendered, can not enjoin execution under the judgment upon grounds of which he might, with due diligence, have availed himself in defense of the action.<sup>30</sup>

§ 1384. **Judgment upon note not merged in that upon injunction bond.** Where judgment is obtained against the principal and his sureties upon a promissory note, and the principal enjoins the judgment, giving other sureties upon the injunction bond, and the injunction is afterward dissolved and judgment rendered upon the bond, which is satisfied in part upon execution, the original judgment upon the note is not merged in that upon the injunction bond; the sureties upon the original note can not, therefore, restrain the enforcement of the judgment against them.<sup>31</sup>

§ 1385. **Contribution.** It is held that one surety can not by injunction restrain proceedings at law by his co-surety for contribution unless he tenders the amount due the co-surety who has paid the debt, or alleges his readiness to pay.<sup>32</sup> And the fact that an administrator has wasted the estate, and one of his sureties is threatened with suit by the legatees of the estate to make good such *devastavit*, would seem to be insufficient ground for enjoining the enforcement of a judgment in favor of the heirs of a co-surety upon the administrator's bond, upon a bill seeking to enforce contribution out of such judgment as assets of the co-surety's estate.<sup>33</sup>

<sup>29</sup> *Smith v. McLain*, 11 West Va., 654. See also *Gatewood v. Burns*, 579.

<sup>99</sup> N. C., 357, 6 S. E., 635.

<sup>80</sup> *Clegg v. Darragh*, 63 Tex., 357.

<sup>31</sup> *Gowan v. Graves*, 10 Heisk.,

<sup>32</sup> *Craig v. Ankeney*, 4 Gill, 225.

<sup>33</sup> *Poullain v. English*, 57 Ga., 492.

§ 1386. **When suit enjoined; discharge of mortgage by co-surety; equitable defenses.** Where a surety has entered into an obligation in writing, upon the understanding and faith of another person also executing the agreement as co-surety, which the latter fails to do, the surety may have the aid of an injunction to restrain proceedings at law upon the written instrument.<sup>34</sup> And one of two sureties may have an injunction to prevent a co-surety from discharging a mortgage given to secure the two sureties, and from dismissing a suit which is being prosecuted for their protection.<sup>35</sup> So the prosecution of an action at law against a surety upon an official bond may be enjoined upon the ground of equitable defenses which can not be interposed in defense of the action.<sup>36</sup>

<sup>34</sup> *Evans v. Bremridge*, 8 DeGex, M. & G., 100, affirming S. C., 2 Kay & J., 174.

<sup>35</sup> *Sheehan v. Taft*, 110 Mass., 331. The doctrine was stated by Lord Hardwicke that a surety upon an official bond might enjoin a suit against him upon the bond until an account could be taken of

whether anything was due to the plaintiff; since there might be a breach of the condition of the bond, yet nothing due. *Peck v. Payne*, Ca. temp. H., 295. It is doubtful, however, whether such a doctrine would now be recognized or enforced.

<sup>36</sup> *Penn. v. Ingles*, 82 Va., 65.



## CHAPTER XXVI.

### OF INJUNCTIONS BETWEEN HUSBAND AND WIFE.

- § 1387. Sale of wife's property for husband's debts enjoined.
- 1388. Further illustrations.
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- 1390. Purchase money furnished by husband.
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§ 1387. **Sale of wife's property for husband's debts enjoined.** The most frequent ground for invoking the aid of equity by injunction, in matters growing out of or dependent upon the relation of husband and wife, is in cases where it is sought to protect the separate property of the wife from being taken in satisfaction of the liabilities of the husband. And the doctrine is well established by a uniform current of authority that an injunction is the appropriate remedy for the protection of a married woman in the enjoyment of her separate property, as against the husband or his creditors, and courts of equity will freely interpose their preventive aid in such cases.<sup>1</sup> Thus, an injunction will lie at the suit of a married

<sup>1</sup> *Green v. Green*, 5 Hare, 399, *Lewis v. Winston*, 26 La. An., 707; note b; *Johnson v. Vail*, 1 McCart., *Holthaus v. Hornbostle*, 60 Mo., 423; *Hill v. Bowman*, 35 Mich., 439; *Brevard's Ex'rs v. Jones*, 50 191; *Patterson v. Fish*, *Ib.*, 209; *Ala.*, 221; *Deville v. Hayes*, 23 La.

woman to restrain the sale of her own separate personal property upon execution under a judgment against her husband.<sup>2</sup> So a married woman may enjoin the sale of her lands on execution under a judgment against her husband.<sup>3</sup> The exercise of the jurisdiction in such cases has been based upon the necessity of preventing a cloud upon title, and it has been held that, in the event of ejectment being brought by a purchaser at such sale, the wife would be compelled to give evidence *dehors* the conveyance from her grantor to show that she bought and paid for the property with her separate funds.<sup>4</sup> So a sale of the wife's property, held in trust by the husband, under execution against him, may be enjoined.<sup>5</sup> And where property is settled upon the wife before marriage as her separate property, in trust for her sole use and benefit, she is entitled to the aid of equity to restrain her husband from interfering therewith.<sup>6</sup> And a creditor of the husband will be enjoined from selling the proceeds of the wife's real estate in satisfaction of his debt against the husband, although such proceeds have been raised by the labor of the wife and minor children of the husband. And the fact that the husband in such case has not been joined as a defendant in the action will not warrant a dissolution, but leave will be given to amend.<sup>7</sup> So where an execution against a husband is levied upon property of the wife, her title to which is founded

An., 550; *Fairchild v. Knight*, 18 Fla., 770; *Einstein v. Bank*, 137 Cal., 47, 69 Pac., 616. And see *Chavez v. McKnight*, 1 New Mexico, 147; *Pearson v. Denham*, 78 Ga., 545, 3 S. E., 336. But see *Bell v. Francke*, 23 La. An., 599.

<sup>2</sup> *Holthaus v. Hornbostle*, 60 Mo., 439; *Fairchild v. Knight*, 18 Fla., 770.

<sup>3</sup> *Hill v. Bowman*, 35 Mich., 191; *Patterson v. Fish*, *Ib.*, 209; *Fairchild v. Knight*, 18 Fla., 770; *City of Cleburne v. Gulf, C. & S. F. R.*

*Co.*, 66 Tex., 457, 1 S. W., 342; *Tibbetts v. Fore*, 70 Cal., 242, 11 Pac., 648; *Einstein v. Bank*, 137 Cal., 47, 69 Pac., 616. See, *contra*, *Spencer v. Rosenthal*, 58 Tex., 4; *Rea v. Longstreet*, 54 Ala., 291.

<sup>4</sup> *Tibbetts v. Fore*, 70 Cal., 242, 11 Pac., 648. But see, *contra*, *Rea v. Longstreet*, 54 Ala., 291.

<sup>5</sup> *Simrall v. Grant*, 79 Ky., 435.

<sup>6</sup> *Green v. Green*, 5 Hare, 399, note b.

<sup>7</sup> *Johnson v. Vail*, 1 McCart., 423.

upon a purchase at a sheriff's sale under an execution in her favor and against her husband upon a decree in chancery, and a contest at law would involve transactions between the husband and wife and rights of property which are perhaps sustainable only in equity, the wife may maintain a bill to establish her rights and to enjoin a sale under execution against her husband.<sup>8</sup> And where land is conveyed to a husband and wife and to a third person, the husband and wife take by entireties and the land is not subject to execution for the husband's debts. Equity will, therefore, in such case enjoin a sale of the lands under execution against the husband.<sup>9</sup> So when property is conveyed by a husband, the wife joining, to a third person in trust that it shall be reconveyed to the wife, such grantee having no beneficial interest and only taking the title in trust for the wife, the sale of the property under execution against the trustee may be enjoined.<sup>10</sup>

§ 1388. **Further illustrations.** In accordance with the general principle that a sale of a wife's property to satisfy a debt of her husband affords good ground for the interference of equity, where the judgment creditors of the husband purchase a mortgage upon the wife's land, and issue execution thereon for the purpose of securing their judgments against the husband, they may be enjoined from proceeding until they shall execute an assignment of the mortgage to the wife, upon her payment of the mortgage debt, with interest and costs.<sup>11</sup> So the wife may enjoin the prosecution of repeated actions of ejectment by a purchaser of her property at a sale under execution against her husband, when such actions are prosecuted with a view of harassing the wife and have the effect of clouding her title.<sup>12</sup> Where, however, the case is simply one of a conflict of interest, the wife's title being disputed and

<sup>8</sup> Brevard's Ex'rs v. Jones, 50 Ala., 221.

<sup>11</sup> Lyon's Appeal, 61 Pa. St., 15.

<sup>9</sup> Hulett v. Inlow, 57 Ind., 412.

<sup>12</sup> Thompson's Appeal, 107 Pa. St., 559.

<sup>10</sup> Cox v. Arnsmann, 76 Ind., 210.

the creditor having a right to proceed against the property to test her title, it is error for a court of equity to assume jurisdiction, and, by restraining the execution, thus to withdraw the questions in dispute from a trial by jury.<sup>13</sup> Nor can the husband prevent by injunction the sale of his property on execution against himself, upon the ground that he has transferred the property to his wife for a debt due her, since if the wife does not complain of such proceedings the husband will not be allowed relief.<sup>14</sup> And an injunction will not lie to restrain the execution of a judgment in forcible entry and detainer against a husband, for land claimed by the wife as her separate estate, upon the ground that the wife was not a party to the proceedings.<sup>15</sup> So when the husband is in apparent possession and active control of the property, dealing with it as his own, it is incumbent upon the wife who seeks to restrain its sale under execution against the husband to establish by clear and undoubted proof a *bona fide* title, and her mere assertion of such title will not warrant the relief.<sup>16</sup> Nor will the injunction be granted when the wife's title is under a voluntary conveyance from the husband after incurring the indebtedness upon which the judgment was recovered against him, and with intent to defraud his creditors.<sup>17</sup> And when, under the laws of the state, the wife may contract debts in conducting business upon her own account, and a judgment for an indebtedness so contracted becomes a lien upon her separate real estate, she can not enjoin its sale under such judgment.<sup>18</sup> Nor can a widow enjoin a sale of property of her deceased husband by his judgment creditors, upon a bill claiming dower in the premises, when she is in possession and when notice of her rights at the sale will afford ample protection, such sale being subject to her rights.<sup>19</sup>

<sup>13</sup> Winch's Appeal, 61 Pa. St., 424.

<sup>16</sup> Erdman v. Rosenthal, 60 Md.,

<sup>14</sup> Burus v. Bidwell, 23 La. An., 312.

296.

<sup>17</sup> May v. Huntington, 66 Ga.,

<sup>15</sup> Saunders v. Webber, 39 Cal., 208.

287.

<sup>18</sup> Burk v. Platt, 88 Ind., 283.

<sup>19</sup> Jackson v. Rainey, 64 Ga., 311.

§ 1389. **Sale of wife's personal property enjoined.** A married woman is entitled to the aid of an injunction to restrain a sale of her separate personal property under proceedings in replevin, instituted by her husband in her name, but without her knowledge or consent, the judgment in such replevin suit being void, and there being no adequate remedy at law.<sup>20</sup>

§ 1390. **Purchase money furnished by husband.** While equity extends its protection to the separate estate of the wife, as against creditors of the husband, yet if the legal title to the property levied upon be in the husband, who has himself furnished a portion of the purchase money, the court will not interfere. Thus, where the wife has negotiated for the purchase of certain real estate, but the conveyance is made to the husband, he paying a portion of the purchase money, and she the remainder from her own earnings, no such trust results to the wife as entitles her to an injunction to restrain a judgment creditor of the husband from satisfying his judgment out of the land in question.<sup>21</sup> If, however, the purchase money proceeds entirely from the wife, the title being taken in the name of the husband, the transaction being in good faith and with no intention to defraud creditors, a sale under execution against the husband may be enjoined.<sup>22</sup>

§ 1391. **When husband and wife enjoined from incumbering.** Although it is a general and well established rule that courts of equity will not, at the suit of a general creditor, whose claim is not yet reduced to judgment, restrain a debtor from such disposition of his property as he may see fit to make, yet upon a bill filed against husband and wife to have certain debts contracted by the wife declared a lien upon her separate estate, defendants may be enjoined from conveying or incumbering such estate. The relief is granted in

<sup>20</sup> Sayles v. Mann, 4 Bradw., 516.

<sup>22</sup> Cass v. Demarest, 37 N. J. Eq.,

<sup>21</sup> Skillman v. Skillman, 2 Mc-  
Cart., 479. See also Dunn v. Bax-  
ter, 30 West Va., 672, 5 S. E., 214.

393; Cunningham v. Bell, 83 N. C.,  
328.

such a case upon the ground that the wife's separate property is considered in equity as charged with all debts contracted by her with reference, express or implied, to payment out of such property, and if a bill will lie to make such debts a charge upon the wife's estate, equity may properly prevent the alienation or incumbering of the estate until the relief sought by the bill can be obtained.<sup>23</sup>

§ 1392. **General doctrine further illustrated.** Where by statute the wife's real estate is expressly exempted from sale under execution by creditors of the husband, an injunction is the proper remedy for the protection of the property against such sale, and it is error to dismiss a bill filed by the wife for this purpose.<sup>24</sup> But a court of equity will not entertain jurisdiction to restrain the husband, upon the application of the wife, from obtaining possession of her separate estate, where he has not instituted proceedings in any court, either of law or of equity, to obtain control of the property.<sup>25</sup> Nor is the husband, while acting in the capacity of administrator of the estate of his deceased wife, and having no other interest in the premises, entitled to an injunction to prevent the sale of real estate of the wife under a trust deed.<sup>26</sup>

§ 1393. **Injunction pending proceedings for divorce.** The aid of equity by injunction is most frequently sought, as between husband and wife, in cases of application for divorce from the bonds of matrimony, and it may be stated as a general rule that, pending proceedings for divorce, a proper case of emergency being shown, the husband may be enjoined from interfering with the custody of the children or of property in possession of the wife.<sup>27</sup> So the husband will be enjoined

<sup>23</sup> *Oakley v. Pound*, 1 McCart., 178.

<sup>24</sup> *Hunter's Appeal*, 40 Pa. St., 194.

<sup>25</sup> *Parsons v. Parsons*, 9 N. H., 309.

<sup>26</sup> *Stringham v. Brown*, 7 Iowa, 33.

<sup>27</sup> *Wilson v. Wilson*, Wright (Ohio), 129; *Edwards v. Edwards*, Ib., 308; *Lyon v. Lyon*, 102 Ga., 453, 31 S. E., 34, 42 L. R. A., 194, 66 Am. St. Rep., 189.

from disposing of his property in such manner as to prevent the wife from obtaining alimony, or a separate maintenance, on a bill pending for that purpose.<sup>28</sup> And upon a bill filed by the wife for divorce and alimony, the husband, being served with process and not appearing, may properly be enjoined from alienating his property in such way as to prevent her from obtaining alimony.<sup>29</sup> So in an action for divorce brought by the wife the court may enjoin the enforcement of judgments which the husband has fraudulently caused to be recovered against himself and in favor of his children to defeat the rights of the wife.<sup>30</sup> And an injunction has been granted, pending a bill for divorce brought by the wife, to restrain the husband from interfering with her separate property until the final hearing of the cause.<sup>31</sup>

§ 1394. **Apprehensions of abandonment insufficient.** Mere apprehension of abandonment by the husband, and of failure to support the wife, is not sufficient cause to warrant the interposition of equity in restraining him from disposing of his property, since injunctions are not usually allowed upon mere apprehensions of future wrong. And where a preliminary injunction has been allowed in such a case, it will be dissolved on the coming in of the answer denying any intention on the part of the husband to abandon his wife.<sup>32</sup>

§ 1395. **Extent of injunction in divorce proceedings.** An injunction obtained by the wife against the husband, pending proceedings for divorce, will restrain him from incumbering as well as from selling his property.<sup>33</sup> But the wife will not

<sup>28</sup> *Questel v. Questel*, Wright (Ohio), 492; *Johnson v. Johnson*, Kan., 572, 7 Pac., 245.

<sup>29</sup> *Bascom v. Bascom*, Ib., 632; *Springfield M. & F. I. Co. v. Peck*, 102 Ill., 265; *Gray v. Gray*, 65 Ga., 193; *In re White*, 113 Cal., 282, 45 Pac., 323.

<sup>30</sup> *Busenbark v. Busenbark*, 33 Kan., 572, 7 Pac., 245.

<sup>31</sup> *Symonds v. Hallett*, 24 Ch. D., 346.

<sup>32</sup> *Anshutz v. Anshutz*, 1 C. E. Green, 162.

<sup>33</sup> *Vanzant v. Vanzant*, 23 Ill., 536.

<sup>20</sup> *Ricketts v. Ricketts*, 4 Gill, 105. See also *Wharton v. Wharton*, 57 Iowa, 696.

be allowed in such case to restrain the husband from using his property for the support of himself and his children, nor will he be enjoined from using the tools of his trade, or from carrying on his ordinary business.<sup>34</sup> And on granting a decree of divorce in favor of the wife, it is improper to perpetually enjoin the husband from selling his property to insure the payment of alimony.<sup>35</sup>

§ 1396. **Choses in action; transfer of real property.** In a proceeding by a wife against the husband for a divorce *a vinculo* she is not entitled to restrain him from collecting his *choses in action*, unless it is apparent that the safety of the fund will be imperiled by permitting him to reduce it to possession.<sup>36</sup> And when in an action for divorce and alimony brought by the wife against the husband a preliminary injunction is granted to prevent the transfer of the husband's real estate, and upon the final hearing the divorce is granted with permanent alimony, it is error to perpetually restrain the transfer of defendant's real property, but the decree for alimony should be made a lien thereon, and the injunction should be dissolved.<sup>37</sup>

§ 1397. **Partnership.** Equity will not enjoin defendants from disposing of real property upon a bill by a married woman claiming that the property was purchased with her individual funds, which had been by her husband invested in a partnership business and which finally became invested in the real estate in question which was sold to defendants, when it does not clearly appear that the money was put into the firm business without the wife's knowledge or consent, and when notice to the purchasers of her equity is not shown. The pendency

<sup>34</sup> *Rose v. Rose*, 11 Paige Ch., 166.

<sup>35</sup> *Errissman v. Errissman*, 25 Ill., 136.

<sup>36</sup> *Johnson v. Johnson*, 59 Ga., 613.

<sup>37</sup> *Draper v. Draper*, 68 Ill., 17.

See as to the right to an injunction to restrain a father from interference with a child, in an action for divorce under the laws of New Hampshire, *Higgins v. Higgins*, 57

N. H., 224.



of the bill in such a case, being *lis pendens*, is regarded as a sufficient protection to the wife.<sup>38</sup>

§ 1398. **Further illustrations.** When an action at law is brought against the husband's executors, to recover the price of goods sold to the wife during the life-time of the husband, and while she was living apart from him upon a separate maintenance, the bill alleging that this fact was known to the tradesman when the goods were sold, a court of equity will not interfere by injunction, after verdict, since the facts alleged as the ground for equitable relief would have been a proper defense at law.<sup>39</sup> And where, in a deed of separation between husband and wife, the husband condones all offenses then committed, and agrees not to institute proceedings for a divorce upon any ground of complaint existing prior to the deed, an injunction will not be allowed against a divorce suit afterward instituted by the husband, who alleges that he executed the deed on the wife's assurance that she had not committed adultery, which proved to be false, since such contract may be relied upon in defense of the action for divorce.<sup>40</sup> But where a father, who has committed a criminal assault upon his infant daughter, executes an instrument giving to the wife the sole control of his children, he may be restrained from any proceedings to obtain the children from the wife's custody, and from interfering with her in their management and protection.<sup>41</sup> And the interference of equity will be allowed, in a proper case, to prevent the father from removing his child out of the country and beyond the jurisdiction of the court.<sup>42</sup> So, too, in the exercise of its jurisdiction for the care of infants, equity may by injunction restrain an infant from contracting an improper marriage, upon a bill filed for the ex-

<sup>38</sup> *Bryan v. King*, 51 Ga., 291.

<sup>41</sup> *Swift v. Swift*, 34 Beav., 266.

<sup>39</sup> *Ferrars v. Ferrars*, 1 Vern., 71.

<sup>42</sup> *DeManneville v. DeManneville*,

<sup>40</sup> *Brown v. Brown*, 38 L. J. Ch., 10 Ves., 52.

execution of the trusts of a settlement for the benefit of the infant.<sup>43</sup>

§ 1399. **Separation deeds.** When husband and wife have separated and have executed a separation deed, covenanting that the wife may live apart from the husband, and that he will not compel her to cohabit or to live with him, by legal proceedings or otherwise, an injunction may be allowed to prevent a violation of the covenant by the husband instituting proceedings in the divorce court for the restitution of conjugal rights.<sup>44</sup> Where, however, husband and wife enter into a separation deed or agreement in which all past offenses are condoned, and it is covenanted that no proceedings shall be instituted by either party against the other for any cause existing before the execution of the deed, and the husband afterward brings an action for divorce, equity will not enjoin such action, the husband claiming to have executed such deed under misrepresentation and deceit as to the wife's conduct, where the deed may be set up in defense of the action for divorce.<sup>45</sup>

§ 1400. **Ante-nuptial contract.** Where one is indebted to a woman before her marriage, and after her marriage judgment is entered against him upon the debt in the name of husband and wife, the judgment debtor can not restrain the enforcement of such judgment upon the ground of an ante-nuptial contract between husband and wife, which sought to place her property under the protection of a trustee for her benefit, the agreement being of a private and secret nature and never being recorded, since payment under the judgment would, in such case, be a complete bar to any future claim by the trustee of the wife.<sup>46</sup> Where, however, by an ante-nuptial agreement the husband was to conduct the wife's farm, she agreeing that

<sup>43</sup> Dawson v. Thompson, 12 L. T. N. S., 178. <sup>45</sup> Brown v. Brown, L. R. 7 Eq., 185.

<sup>44</sup> Hunt v. Hunt, 4 De Gex, F. & J., 221. <sup>46</sup> Hill v. Garman, 2 Del. Ch., 273.

the products of the farm should be contributed to the support of the family during their marriage, and upon the faith of such agreement the husband made extensive improvements at his own expense, he was allowed to enjoin a grantee of the wife, with full notice, from interfering with his rights in the premises.<sup>47</sup>

§ 1401. **Injunction denied against suit for dower.** As regards the right to relief by injunction against the prosecution of suits for dower, equity will not lend its aid by injunction to restrain a widow from prosecuting her claim for dower in the lands of her deceased husband, when the bill fails to show anything which would be a bar in law to the right of dower.<sup>48</sup>

§ 1401 *a*. **Injunction against divorce proceeding in foreign state; service by publication; punishment for violation of injunction.** Where a husband or wife leaves the state of their domicile and goes to a foreign state and there secures a mere nominal or colorable residence for the purpose of bringing divorce proceedings, such a case of injustice and irreparable injury is made out as to entitle the aggrieved spouse to an injunction restraining the other from prosecuting divorce proceedings in that state based upon such pretended domicile.<sup>49</sup> And since proceedings relating to the validity or dissolution of marriage are in the nature of proceedings *in rem*, the injunction may be granted upon service by publication, and, upon being brought to the notice of the defendant, is binding, although the court has been unable to acquire jurisdiction over the person of the defendant by personal service of its process within the state.<sup>50</sup> But where the defendant has been guilty of a violation of such an injunction by prosecuting the divorce proceeding to a final decree, it is improper to punish him by

<sup>47</sup> *Stratton v. Stratton*, 58 N. H., 244, modified and affirmed in 63 N. J. Eq., 783, 52 Atl., 360, 625.

<sup>48</sup> *Kenan v. Johnson*, 48 Ga., 28.      <sup>50</sup> *Kempson v. Kempson*, 61 N.

<sup>49</sup> *Kempson v. Kempson*, 58 N. J. J. Eq., 303, 48 Atl., 244, modified Eq., 94, 43 Atl., 97; *Kempson v.* and affirmed in 63 N. J. Eq., 783, *Kempson*, 61 N. J. Eq., 303, 48 Atl., 52 Atl., 360, 625.

imprisonment until he takes the necessary steps to open up and set aside the decree since only the court which rendered it has the power to have it vacated.<sup>51</sup>

<sup>51</sup> *Kempson v. Kempson*, 61 N. J. affirmed in 63 N. J. Eq., 783, 52 Eq., 303, 43 Atl., 244, modified and Atl., 360, 625.

## CHAPTER XXVII.

### OF INJUNCTIONS IN BEHALF OF CREDITORS.

- § 1402. Transfers in fraud of creditors enjoined.
- 1403. Creditors without judgment denied relief.
- 1404. Creditor having lien entitled to relief.
- 1405. Rights of attaching creditors.
- 1406. Exceptions to the general rule.
- 1407. The general doctrine as modified by legislation.
- 1408. English and Irish practice in creditors' suits.
- 1409. The same.
- 1410. Supplemental proceedings under code practice.
- 1411. Voluntary assignment for benefit of creditors.
- 1412. Conflicting claimants under executions.
- 1413. Misappropriation of fund.
- 1414. Creditors subsequently joining in cause.
- 1415. Accounting between principal and agent.

§ 1402. **Transfers in fraud of creditors enjoined.** The preventive jurisdiction of equity is frequently invoked for the protection of creditors against the fraudulent conduct of their debtors, and fraudulent transfers of property designed to give preference to certain creditors over others, or for the purpose of delaying and hindering creditors, are frequently made the foundation for relief by injunction. It may be laid down as a general rule that equity will enjoin any transfers of a debtor's property made with intent to defraud and delay his judgment creditors, or to give a portion of such creditors preference over others.<sup>1</sup> And where the main purpose of the bill is to set aside a fraudulent transfer of a debtor's goods and effects, made to delay and hinder his creditors, an injunc-

<sup>1</sup> Hyde v. Ellery, 18 Md., 496; sale itself being intended to defraud creditors, and to redeem Witmer's Appeal, 45 Pa. St., 455. See also Beall v. Shaul, 18 West Va., 258. As to the right of a judgment creditor to enjoin a sale under a valid deed of trust, the

from the lien of such incumbrance, see Findley v. Findley, 93 Mo., 493, 6 S. W., 369.

tion is regarded as a necessary adjunct, and is granted as auxiliary to the general relief sought.<sup>2</sup>

§ 1403. **Creditors without judgment denied relief.** It is to be observed, however, that the jurisdiction is not exercised in favor of mere contract creditors, or creditors at large, whose claims are not yet reduced to judgment, and in the absence of statutory provisions authorizing the relief, courts of equity will not, at the suit of other than a judgment creditor, interfere by injunction to restrain a debtor from any disposition of his property, however fraudulent, which he may see fit to make.<sup>3</sup> The principle on which the rule is based is that until the creditor has established his claim by judgment he has no right to question the acts of his debtor and has no concern with his frauds; and to allow the interference, in behalf of mere general creditors, before judgment, would lead to an unjustifiable and often oppressive interruption of the exercise of the debtor's right to control his property.<sup>4</sup> And to warrant the

<sup>2</sup> Hyde v. Ellery, 18 Md., 496.

<sup>3</sup> Wiggins v. Armstrong, 2 Johns. Ch., 144; Holdrege v. Gwynne, 3 C. E. Green, 26; Young v. Frier, 1 Stockt., 465; Uhl v. Dillon, 10 Md., 500; Rich v. Levy, 16 Md., 74; Balls v. Balls, 69 Md., 388, 16 Atl., 18; Frederick Co. Bank v. Shafer, 87 Md., 54, 39 Atl., 320; McGoldrick v. Slevin, 43 Ind., 522; Mills v. Northern R. Co., L. R. 5 Ch., 621; Oberholser v. Greenfield, 47 Ga., 530; Johnson v. Farnum, 56 Ga., 144; Mayer v. Wood, 56 Ga., 427; Dortch v. Dugas, 52 Ga., 231; Hart v. Hart, 52 Ga., 376; Peyton v. Lamar, 42 Ga., 131; Dodge v. Pyrolusite Manganese Co., 69 Ga., 665; Crowell v. Horacek, 12 Neb., 622, 12 N. W., 99; Angell v. Draper, 1 Vern., 399; Shirley v. Watts, 3 Atk., 200; Bennet v. Musgrave, 2 Ves., 51; Phelps v. Foster, 18 Ill.,

309; Bigelow v. Address, 31 Ill., 322; Rhodes v. Cousins, 6 Rand., 188; Artman v. Giles, 155 Pa. St., 409, 26 Atl., 668; Kelly v. Herb, 157 Pa. St., 41, 27 Atl., 559; Ellis v. Hays S. & L. Co., 65 Kan., 174, 69 Pac., 165; Talbott v. Randall, 3 New Mex., 226, 5 Pac., 533; North Hudson M. B. & L. Co. v. Childs, 86 Wis., 292, 56 N. W., 870. But see, *contra*, Cottrell v. Moody, 12 B. Mon., 500; Haggarty v. Pittman, 1 Paige, 298; Rosenberg v. Moore, 11 Md., 376; Ellett v. Newman, 92 N. C., 519; Frank v. Robinson, 96 N. C., 28, 1 S. E., 781. And see Cohen v. Meyers, 42 Ga., 46; Wachtel v. Wilde, 58 Ga., 50.

<sup>4</sup> Wiggins v. Armstrong, 2 Johns. Ch., 144. Kent, Chancellor, observes: "This is a case of a creditor on simple contract, after an action commenced at law, and be-

relief in behalf of a creditor whose demand is not reduced to judgment or lien, there must be some equity other than the mere existence of a demand and the probability that de-

fore judgment, seeking to control the disposition of the property of his debtor, under judgments and executions, upon the ground of fraud. My first impression was in favor of the plaintiffs; but, upon examination of the cases, I am satisfied that a creditor at large, and before judgment and execution, can not be entitled to the interference which has been granted in this case. In *Angell v. Draper* (1 Vern., 399), and *Shirley v. Watts* (3 Atk., 200), it was held, that the creditor must have completed his title at law, by judgment and execution, before he can question the disposition of the debtor's property; and in *Bennet v. Musgrave*, (2 Ves., 51), and in a case before Lord Nottingham, cited in *Balch v. Wastall* (1 P. Wms., 445), the same doctrine was declared, and so it is understood by the elementary writers. (Mitford, 115; Cooper, Equ. Pl., 149.) The reason of the rule seems to be that, until the creditor has established his title, he has no right to interfere, and it would lead to an unnecessary, and, perhaps, a fruitless and oppressive interruption of the exercise of the debtor's rights. Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds. On the strength of settled authorities, I shall, accordingly, grant the motion for dissolving the injunction." So it is said in *Rhodes v. Cousins*, 6 Rand., 188, to be "well settled law

that none but a judgment creditor can have the assistance of equity to control, prevent, or interfere with in any way, the disposition which a debtor may choose to make of his property. He may destroy it, give it away, convey it fraudulently, or sell it and waste the money, and no creditor at large can stop him by injunction. A creditor must have proceeded as far as he can at law. If he means to affect the land, he must have a judgment at law and take his *elegit*. If the personalty, there must be a judgment and execution issued and he must show in his bill that he has done this, or it may be demurred to." An exception has been taken in the case of trespass for malicious injury to property, and a plaintiff, in such case, before judgment recovered, has been allowed to enjoin defendants from fraudulently disposing of their property to evade the payment of such damages as might be awarded in the action at law, the relief being granted on the ground that the ancillary jurisdiction of the court of equity by injunction was necessary for the protection of plaintiff in his legal remedy. *Cottrell v. Moody*, 12 B. Mon., 500. And in *Rosenberg v. Moore*, 11 Md., 376, an injunction was granted and a receiver appointed in behalf of general creditors, before judgment, upon the ground of a fraudulent conveyance by the debtor of a portion of his property in trust

fendant will not apply his property to its settlement.<sup>5</sup> So an injunction has been refused, pending a trial at law, where it was sought to restrain defendants from disposing of their goods in order that they might be levied upon under the judgment not yet obtained.<sup>6</sup> So where a clerk has embezzled the goods of his employers and converted them into money which he has deposited in bank to his own credit, he will not be enjoined from disposing of the money on the ground that he has no other property and is about to leave the country, it not appearing that the money was the specific money of complainants, or that it had arisen from the sale of their goods.<sup>7</sup> And a simple contract creditor, who has no lien upon his debtor's property, will not be allowed to enjoin a sale of such property under a mortgage given by the debtor.<sup>8</sup> So creditors whose demands are not reduced to judgment are not entitled to an injunction and a receiver because of their debtor having entered an appearance and consented to judgment in actions brought by other creditors upon debts justly due, since it is the right of a debtor to prefer any creditor if he so choose.<sup>9</sup> Nor can a mere contract creditor of a railway company interfere by injunction with the disposition of the assets of the corporation, when he has no lien or security thereon.<sup>10</sup>

for his creditors, and upon the further ground that the property was in imminent danger, being in the custody of a person of notoriously bad character. But it does not appear from the case as reported that the objection was made that plaintiffs had no judgment or lien upon the property in controversy. So in *Haggarty v. Pittman*, 1 Paige, 298, an injunction and a receiver were allowed in behalf of creditors without judgment, upon a bill alleging insolvency of the debtor, and that he had made an assignment of his property to one

of his creditors who was himself insolvent. These cases, however, are clearly irreconcilable with the decided weight of authority, as above shown.

<sup>5</sup> *Peyton v. Lamar*, 42 Ga., 131. See also *Cubbedge v. Adams*, 42 Ga., 124.

<sup>6</sup> *Phelps v. Foster*, 18 Ill., 309.

<sup>7</sup> *McKenzie v. Cowing*, 4 Cranch C. C., 479.

<sup>8</sup> *Peyton v. Lamar*, 42 Ga., 131.

<sup>9</sup> *McGoldrick v. Slevin*, 43 Ind., 522.

<sup>10</sup> *Mills v. Northern R. Co.*, L. R. 5 Ch., 621. Lord Chancellor Hath-



So the confession of judgment by a debtor in favor of some of his creditors, who have instituted suits against him for the recovery of their demands, will not warrant an injunction against the enforcement of such judgments, upon the application of other creditors without judgments.<sup>11</sup> And the mere fact that a judgment, if recovered against a debtor, will lessen his ability to pay his other debts affords no ground for another creditor to enjoin the prosecution of the former suit.<sup>12</sup>

§ 1404. **Creditor having lien entitled to relief.** If, however, the creditor has a lien or charge upon the property of his debtor, even though his demand may not be reduced to judgment, he occupies a different relation from that of a mere contract creditor, and may properly invoke the preventive powers of the court for his protection. For example, persons who have advanced money for repairs and supplies to a vessel, and who have received from the master an assignment of all the freight money and earnings of the vessel upon her voyage, and all lien and interest which he as master had therein, may be allowed an injunction to prevent interference with the collection of the freight and a receiver to collect it, when it is shown that the owners are insolvent, and that the relief is necessary to protect the lien acquired by such assignment.<sup>13</sup> And when, by agreement between them, the debtor gives his creditor an equitable charge upon a particular fund coming

erley says, p. 628: "I have never before heard—and I have asked in vain for any such precedent—of any attempt on the part of a creditor to file a bill of this description against a company, claiming the interference of the court on the ground that he, having no interest in the company, except the mere fact of being a creditor, is about to be defrauded by reason of their making away with their assets. It would be a fearful authority for this court to assume, for it would

be called upon to interfere with the concerns of almost every company in the kingdom against which a creditor might suppose that he had demands, which he had not established in a court of justice, but which he was about to proceed to establish."

<sup>11</sup> *McGoldrick v. Slevin*, 43 Ind., 522.

<sup>12</sup> *McBride v. Little*, 115 Mass., 308.

<sup>13</sup> *Sorley v. Brewer*, 18 How. Pr., 276.

to the debtor, in consideration of which the creditor forbears to enforce his judgment, he may enjoin the debtor from receiving the fund out of court until payment of his judgment.<sup>14</sup> So a judgment creditor, after return of execution *nulla bona*, may enjoin a sheriff who has money in his hands belonging to the debtor from payment to the debtor, the latter being insolvent and the bill seeking to subject the money to the payment of plaintiff's judgment.<sup>15</sup> But upon a bill by a judgment creditor to set aside a conveyance of his property by the debtor upon the ground of fraud, the grantees of the debtor in possession will not be enjoined from cutting and removing wood from the land, when its value without the wood is amply sufficient to satisfy the demand of such creditor, if the conveyance is set aside.<sup>16</sup>

§1405. **Rights of attaching creditors.** Upon the question whether an attaching creditor, whose demand is not yet reduced to judgment, may properly invoke the aid of equity to enjoin a transfer of the debtor's property, the authorities are not altogether uniform. The weight of authority, however, seems clearly to support the doctrine that an attaching creditor has a sufficient interest in or lien upon the property of his debtor to entitle him to relief by injunction against a transfer by the debtor of his property.<sup>17</sup> And when notice of garnishment has been served upon a garnishee under attachment proceed-

<sup>14</sup> Riccard v. Prichard, 1 Kay & J., 277.

<sup>15</sup> Ward v. Whitfield, 64 Miss., 754, 2 So., 493. As to the right of a creditor claiming an equitable lien upon the debtor's stock of goods, under a parol agreement to mortgage the goods as security for such creditor, to restrain the debtor from disposing of the property, see Triebert v. Burgess, 11 Md., 452.

<sup>16</sup> Portland Building Association v. Creamer, 34 N. J. Eq., 107.

<sup>17</sup> Heyneman v. Dannenberg, 6

Cal., 376; Joseph v. McGill, 52 Iowa, 127, 2 N. W., 1007; Blum v. Schram, 58 Tex., 524; Meacham Arms Co. v. Swarts, 2 Wash., 412, 7 Pac., 859; People v. Van Buren, 136 N. Y., 252, 32 N. E., 775, 20 L. R. A., 446; Cartwright v. Bamberger, 90 Ala., 405, 8 So., 264. See, *contra*, Martin v. Michael, 23 Mo., 50; Artman v. Giles, 155 Pa. St., 409; 26 Atl., 668; Talbott v. Randall, 3 New Mex., 226, 5 Pac., 533. And see Conover v. Ruckman, 33 N. J. Eq., 303.

ings, the sale of property in his hands under judgments recovered against the debtor subsequent to the attachments may be enjoined.<sup>18</sup> So it is held that the lien obtained by an attachment suit is sufficient to entitle the attaching creditor to enjoin a sale of the attached property, under a fraudulent proceeding by a distress for rent against the debtor.<sup>19</sup> So an attachment lien has been held sufficient to authorize an injunction against the sale of the attached property, under a prior levy based upon a judgment which the debtor has fraudulently confessed for the purpose of hindering his creditors, where it is evident that the sale is for the purpose of removing the attached property from the jurisdiction of the officer who has it in his custody.<sup>20</sup>

§ 1406. **Exceptions to the general rule.** While, as has thus been shown, the general doctrine is well established that equity will not interfere by injunction in behalf of creditors before judgment to restrain any disposition or transfer of the property of their debtor, an exception has been recognized when the relief was necessary for the prevention of a multiplicity of suits. Thus, where the debtors were beyond the jurisdiction of the court, but had assets within its jurisdiction in the hands of an agent, and their creditors were exceedingly numerous and there were many conflicting claimants for an equitable priority in the assets, it was regarded as an appropriate remedy to enjoin the prosecution of attachment suits brought by different creditors against the assets, in order that the rights of all parties might be determined in one proceeding in equity.<sup>21</sup> So where the demand of creditors is for supplies actually furnished their debtor and entering into the goods which he manufactures, in consideration of which a

<sup>18</sup> *Northfield Knife Co. v. Shapleigh*, 24 Neb., 635, 39 N. W., 788.      Y., 252, 32 N. E., 775, 20 L. R. A., 446.

<sup>19</sup> *Cogburn v. Pollock*, 54 Miss., 639.      <sup>21</sup> *Ballin v. Ferst*, 55 Ga., 546. See *Seligman v. Ferst*, 57 Ga., 561.

<sup>20</sup> *People v. Van Buren*, 136 N.

portion of the goods is sold to plaintiffs and partly delivered under the sale, it is proper to enjoin an attempt by other creditors to get possession of such goods upon facts tending to show a fraudulent conspiracy to defeat the rights of plaintiffs.<sup>22</sup> And where under the laws of the state all debts due from a deceased person become a lien upon his real property from the time of his death, creditors are entitled to the aid of equity to enjoin a fraudulent transfer of his real estate made by their debtor in his life-time.<sup>23</sup>

§ 1407. **The general doctrine as modified by legislation.** The general rule denying relief by injunction against transfers of their debtor's property in behalf of creditors whose demands have not been reduced to judgment has been modified by legislation in some of the states. But even under such legislation specific averments of fraud must be shown to warrant the relief, since in such cases the courts require strong *prima facie* evidence of the facts on which complainant's equity rests.<sup>24</sup> And allegations that complainant fears and believes that defendant is about to perpetrate a fraud upon him by placing his effects beyond the reach of his creditors are not sufficient to justify the court in granting relief.<sup>25</sup> But it has been held under a statute authorizing injunctions in behalf of general creditors before judgment, to prevent a fraudulent disposition of the debtor's property, that allegations that the debtor has, by a fraudulent bill of sale, placed his property

<sup>22</sup> *Smith v. McElwain*, 57 Ga., 247.

<sup>23</sup> *Appeal of Fowler*, 87 Pa. St., 449.

<sup>24</sup> *Lanpheimer v. Rosenbaum*, 25 Md., 219. Under the statutes of Indiana it is held that a creditor before judgment may, in cases of emergency, restrain the removal or disposal of his property by the debtor. *Morey v. Ball*, 90 Ind., 450. And under a statute of Penn-

sylvania providing that the debts of a decedent shall be a lien upon his real estate for five years after his death, creditors without judgment may maintain a bill to set aside a conveyance of his real estate made by the deceased in fraud of his creditors. *Appeal of Fowler*, 87 Pa. St., 449.

<sup>25</sup> *Hubbard v. Hubbard*, 14 Md., 356.

beyond the reach of legal process, are as effective as averments of insolvency, and it appearing that no other property of the debtor can be found, save that covered by the bill of sale, the injunction should be awarded.<sup>26</sup>

§ 1408. **English and Irish practice in creditors' suits.** Under the practice of the English and Irish Courts of Chancery, after a decree for an accounting in a creditor's suit for the administration of the assets of a deceased debtor, injunctions were frequently allowed to restrain proceedings at law by creditors.<sup>27</sup> And when the court, in such a suit, had taken the fund into its own hands, and had made a decree for the payment of debts, or a decree *quod computet*, it would restrain creditors of the estate from proceeding by actions at law against the executor.<sup>28</sup> So a judgment creditor of the deceased testator, with notice of such a decree, might be enjoined from proceeding under a judgment recovered by him against the testator, since such proceedings would withdraw the assets from the general fund which ought to be distributed among the creditors.<sup>29</sup> So, too, a legatee who had proven his demand under the decree might be enjoined from afterward bringing an action at law against the executor to recover his legacy.<sup>30</sup> And it seems to have been a common practice to grant the injunction in such a case upon motion in the original suit in equity, and without a new action for that purpose.<sup>31</sup> Upon principles similar to those governing the jurisdiction as exercised in Great Britain, it is held in this country that where proceedings for the settlement of an insolvent estate are pend-

<sup>26</sup> Conolly v. Riley, 25 Md., 402.

<sup>27</sup> Martin v. Martin, 1 Ves. Sr., 211; Brooks v. Reynolds, 1 Bro. C. C., 183 and notes; Goate v. Fryer, 3 Bro. C. C., 24; S. C., 2 Cox, 201; Hardcastle v. Chettle, 4 Bro. C. C., 119; Paxton v. Douglas, 8 Ves., 520; Belmore v. Belmore, 12 Ir. Eq., 493; Molyneux v. Scott, 3 Ir. Ch., 291.

<sup>28</sup> Brooks v. Reynolds, 1 Bro. C. C., 183 and notes; Goate v. Fryer, 3 Bro. C. C., 24; S. C., 2 Cox, 201; Hardcastle v. Chettle, 4 Bro. C. C., 119.

<sup>29</sup> Belmore v. Belmore, 12 Ir. Eq., 493.

<sup>30</sup> Molyneux v. Scott 3 Ir. Ch., 291.

<sup>31</sup> Paxton v. Douglas, 8 Ves., 520.

ing in the proper court of probate powers, which has full jurisdiction of the matter, the rights and equities of the creditors in the estate being equal, a creditor who subsequently obtains judgment at law upon his demand may be enjoined from enforcing his judgment, such a case plainly falling within the doctrine that equality is equity.<sup>32</sup>

§ 1409. **The same.** While the practice was a common one in the English and Irish Courts of Chancery of thus restraining creditors from proceeding with suits against the representatives of a deceased person, after a decree to account in a creditor's suit for administration of assets, it was based upon the existence of a decree in equity which gave the creditor relief equivalent to that which he might obtain by his action at law. Unless, therefore, there was such an existing decree in equity in the same country, under which the creditor could prove his demand, the court of chancery would not deprive him by injunction of the ordinary remedy by action at law.<sup>33</sup> And while the court would enjoin creditors from proceeding at law against the estate of a deceased debtor when a decree had been made in a suit for the administration of his estate in equity, it would not enjoin a creditor from proceeding against the executors personally, if they had made themselves liable.<sup>34</sup>

§ 1410. **Supplemental proceedings under code practice.** Under the codes of procedure, which prevail in many of the states, supplemental proceedings have taken the place of the former creditor's bill in equity, which had its origin in the Court of Chancery of New York. And where the statute authorizes the court, in such proceedings, to forbid a transfer or other disposition of the debtor's property not exempt from execution, it is proper to enjoin the debtor in the first instance and summarily from disposing of his property, regardless of

<sup>32</sup> *Scarlett v. Hicks*, 13 Fla., 314.

<sup>34</sup> *Burles v. Popplewell*, 10 Sim.,

<sup>33</sup> *Browne v. Roberts*, I. R. 5 Eq., 383.

whether a receiver has been appointed in the cause. And the argument that such a summary power may be so exercised as to work great hardship to the debtor will not avail against the injunction, since he may prevent such hardship by paying the judgment.<sup>35</sup>

§ 1411. **Voluntary assignment for benefit of creditors.** The creditors of an insolvent banking corporation, which has made a voluntary assignment for the benefit of its creditors, will not be enjoined at the suit of the assignee from taking proceedings for the enforcement of their demands when they have not accepted of such assignment.<sup>36</sup> Nor, upon the other hand, will the creditors in such case be allowed to enjoin the assignee from proceeding with the management of the estate when no allegation is made against his integrity, or solvency, or his fitness to administer the estate, and when no real danger to the assets is shown.<sup>37</sup> Creditors may, however, enjoin waste and mismanagement by the assignees of the debtor.<sup>38</sup> But a receiver of the property of a judgment debtor, appointed in a creditor's suit, who institutes an action for the recovery of property which had been assigned by the debtor under a voluntary assignment for the benefit of creditors, is not entitled in such action to a receiver of the property assigned and an injunction, when he fails to show that the assignment was made to delay, hinder or defraud the creditors of the assignor.<sup>39</sup> And an assignee under a general assignment for the benefit of creditors can not enjoin a creditor residing in the same state from proceeding with an attachment suit against the property of the debtors in another state, the at-

<sup>35</sup> *In re Perry*, 30 Wis., 268.

<sup>36</sup> *Gresham, Assignee v. Crossland*, 59 Ga., 270. See as to the right of a judgment creditor of an insolvent corporation to enjoin other creditors from proceeding at law, in an action for the appointment of a receiver to wind up such

corporation under the laws of New York, *Hutchinson v. New York Central Mills*, 2 Ab. Pr., 394.

<sup>37</sup> *City Bank v. Crossland*, 59 Ga., 270.

<sup>38</sup> *Cohen v. Morris*, 70 Ga., 313.

<sup>39</sup> *Bostwick v. Elton*, 25 How. Pr., 362.

tachment having been instituted prior to the assignment and such creditor never having become a party to or participated in the benefits of the assignment.<sup>40</sup>

§ 1412. **Conflicting claimants under executions.** When there are conflicting claimants under various executions, a court of equity will not enjoin a sale of personal property under the executions, upon an allegation that the justice of the peace before whom the contest is pending has combined with some of the parties in interest to defeat plaintiff's right; since the court will not presume that the justice will administer the law improperly, and if he does, his errors should be corrected at law and not in equity.<sup>41</sup>

§ 1413. **Misappropriation of fund.** Where by agreement between several judgment creditors certain property of the debtor is sold, the proceeds of the sale to be applied in a particular manner in reduction of the indebtedness, a misappropriation of the fund thus received, to the prejudice of some of the creditors, would seem to afford sufficient ground to enjoin a further sale under execution by one of the creditors, until a final hearing.<sup>42</sup>

§ 1414. **Creditors subsequently joining in cause.** Where creditors, who sue in behalf of themselves and all others who shall become parties to the cause, seek to enjoin defendants from disposing of their property, and by agreement of the parties a preliminary injunction is granted as to part and refused as to part, creditors who subsequently come in and join in the proceeding will be held bound by such agreement, and will be denied an injunction as to the part before refused by agreement.<sup>43</sup>

<sup>40</sup> *Jenks v. Ludden*, 34 Minn., 482, 27 N. W., 188.

<sup>41</sup> *Endres v. Lloyd*, 56 Ga., 547.

<sup>42</sup> *Phillips v. Walker*, 48 Ga., 55.

<sup>43</sup> *Flannegan v. Hardeman*, 53

Ga., 440.



§ 1415. **Accounting between principal and agent.** Upon a bill by a principal against his agent for an accounting, an order enjoining the defendant absolutely from making any transfer or disposition of any real estate, stocks, bonds, or other securities, will not be sustained in the absence of any proof tracing the money of plaintiff into such property.<sup>44</sup>

<sup>44</sup> *Ervin's Appeal*, 82 Pa. St., 188.

## CHAPTER XXVIII.

### OF INJUNCTIONS AGAINST STRIKES AND BOYCOTTS.

§ 1415*a*. General features.

1415*b*. Foundation of the jurisdiction.

1415*c*. Injunctions against picketing and injuries resulting therefrom; analogous to injunctions against nuisance.

1415*d*. Actual violence not necessary to justify relief; writ not limited to intimidating employees under contract.

1415*e*. Injunctions against boycotts; violence need not accompany boycott; trades union may enjoin boycott by another.

1415*f*. Substantial injury must be shown; mere apprehension not sufficient; strike practically over.

1415*g*. Injunctions on behalf of United States; jurisdiction under act of July 2, 1890; jurisdiction independent of act.

1415*h*. No defense that acts are criminal.

1415*i*. Injunctions against striking; peaceful persuasion; payment of money to plaintiff's employees; publishing names of subscribers to strike fund.

1415*j*. Enjoining employees from leaving plaintiff's service; relief upon behalf of receiver of railroad.

1415*k*. Mandatory injunction.

1415*l*. Parties bound by injunction.

1415*m*. Practice in punishing for contempt.

§ 1415 *a*. **General features.** The jurisdiction of equity which has been so frequently invoked, as the result of the labor troubles and disturbances of recent years, for the purpose of restraining all kinds of unlawful interference with one's business upon the part of strikers and their sympathizers or of preventing the carrying out of combinations or conspiracies which have as their object the injury or ruin of one's trade, is founded upon well established principles. And while the exercise of the jurisdiction has been severely criticised in some quarters, the propriety of granting injunctive relief in such cases has never been seriously questioned by any court, and the jurisdiction may now be regarded as too definitely,

and firmly established to admit of doubt.<sup>1</sup> In exercising their preventive aid in such cases, the courts are merely meeting new and unusual conditions as they arise with the application of principles which are themselves at the foundation of equity.<sup>2</sup>

<sup>1</sup>*In re Debs*, 158 U. S., 564, 15 Sup. Ct. Rep., 900; *Arthur v. Oakes*, 11 C. C. A., 209, 63 Fed., 310; *Hopkins v. Oxley Stave Co.*, 28 C. C. A., 99, 83 Fed., 912; *Casey v. Cincinnati Typographical Union*, 45 Fed., 135, 12 L. R. A., 193; *Coeur d'Alene C. M. Co. v. Miners' Union*, 51 Fed., 260, 19 L. R. A., 382; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed., 730, 19 L. R. A., 387; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed., 746, 19 L. R. A., 395; *Consolidated S. & W. Co. v. Murray*, 80 Fed., 811; *American Steel & Wire Co. v. Wire Drawers' Union*, 90 Fed., 608; *Otis Steel Co. v. Local Union*, 110 Fed., 698; *Allis-Chalmers Co. v. Reliable Lodge*, 111 Fed., 264; *Reinecke C. M. Co. v. Wood*, 112 Fed., 477; *United States v. Haggerty*, 116 Fed., 510; *Union Pac. R. Co. v. Ruef*, 120 Fed., 102; *Knudsen v. Benn*, 123 Fed., 636; *Beck v. Ry. Teamsters Union*, 118 Mich., 497, 77 N. W., 13, 42 L. R. A., 407, 74 Am. St. Rep., 421; *United States H. Co. v. Iron Molders' Union*, 129 Mich., 354, 88 N. W., 889; *Sherry v. Perkins*, 147 Mass., 212, 17 N. E., 307; *Vegetahn v. Gunther*, 167 Mass., 92, 44 N. E., 1077, 57 Am. St. Rep., 443; *Hamilton-Brown S. Co. v. Saxey*, 131 Mo., 212, 32 S. W., 1106, 52 Am. St. Rep., 622; *Barr v. Essex Trades Council*, 53 N. J. Eq., 101, 30 Atl., 881; *Cumberland Glass Mfg. Co. v. G. B. B. Assn.*, 59 N. J. Eq., 49, 46

Atl., 208; *Frank v. Herold*, 63 N. J. Eq., 443, 52 Atl., 152; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq., 759, 53 Atl., 230; *Murdock v. Walker*, 152 Pa. St., 595, 25 Atl., 492; *O'Neill v. Behanna*, 182 Pa. St., 236, 37 Atl., 843, 38 L. R. A., 382, 61 Am. St. Rep., 702; *Wick China Co. v. Brown*, 164 Pa. St., 449, 30 Atl., 261; *My Maryland Lodge v. Adt*, (Md. 1905) 59 Atl., 721; *Christensen v. Kellogg Switchboard & S. Co.*, 110 Ill. App., 61.

<sup>2</sup>*Allis-Chalmers Co. v. Reliable Lodge*, 111 Fed., 264; *United States v. Haggerty*, 116 Fed., 510. In the latter case, Jackson, J., uses the following language: "What is an injunction? Is it the exercise of an arbitrary power by the courts of the country, or is it a power that has been recognized from a very early date as one of the branches of administrative justice? I answer this question by affirming that the ordinary use of the writ of injunction is to prevent wrongs and injuries to persons and their property, or to reinstate the rights of persons to their property when they have been deprived of it. It is the most efficient, if not the only remedy to stay irreparable injury, and to punish those who disobey the order of a court granting the writ. \* \* \* A similar writ to this was in use in the days of the Roman empire, and has always been in use in England from the foundation of the common law. It

§ 1415 *b*. **Foundation of the jurisdiction.** As in all other cases where the preventive aid of equity is invoked, the right to the relief is based upon the necessity of preventing irreparable damage to property and property rights, or of restraining actionable wrongs for which the remedy at law can not afford proper and adequate redress. The prevention of a multiplicity of suits and frequently the pecuniary irresponsibility of the defendants afford additional grounds for the exercise of the jurisdiction.<sup>3</sup>

§ 1415 *c*. **Injunctions against picketing and injuries resulting therefrom; analogous to injunctions against nuisance.** The particular wrong, against which the protection of equity by injunction is most frequently sought in this class of cases, takes the form of the establishment and maintenance of a system of espionage which has come to be commonly known

has been in use in this country since the organization of the government. It is not the exercise of any new power by the court, but it is simply an application of the writ to a new condition of things that exists in our day by reason of the advancement in civilization. It is a mistaken idea to suppose that the courts of this country abuse this writ. In my long experience on the bench I cannot recall a single occasion when any court, either federal or state, ever abused it in what are known as 'strike cases.' It is true that our courts have been criticised severely by persons who are inimical to the use of it, and have denounced the courts for 'governing by injunctions.' But this criticism is so obviously unjust to the courts that it is unnecessary to enter into any defense of them. For five or six centuries back it was not an un-

common thing for the courts of our English ancestors to grant a prohibitory writ, as well as a writ of restitution, against persons who combine for any unlawful perpose. It is not my purpose to enter into any lengthy discussion of the remedies by injunction other than to state what seems to me to be the well-settled rule of law in its application to strikes,—that the power of the court may be invoked to restrain and inhibit a combination which is formed to induce employees who are not dissatisfied with the terms of their employment to strike for the purpose of inflicting injury and damage upon their employers."

<sup>3</sup> *Beck v. Ry. Teamsters Union*, 118 Mich., 497, 77 N. W., 13, 42 L. R. A., 407, 74 Am. St. Rep., 421; *Hamilton-Brown S. Co. v. Saxey*, 131 Mo., 212, 32 S. W., 1106, 52 Am. St. Rep., 622; *Barr v. Essex Trades*

as picketing.<sup>4</sup> And while it is often a matter of considerable difficulty to draw the line between what is lawful in this respect and what is unlawful, and while each case must depend very largely upon its own attending facts and circumstances as to whether or not the particular acts complained of are upon one side of the line or the other, it may be stated as a general rule that, while the maintenance of an organized system of picketing, when conducted in an orderly and peaceable manner, is perfectly lawful and therefore affords no ground for relief by injunction, yet where strikers or their sympathizers, or other persons acting in concert with them, are combining and conspiring together, by means of force, threats, intimidation or violence, or other means calculated to intimidate, to coerce plaintiff's employees or those who wish to become employees from remaining in or entering his employ, or to prevent plaintiff's customers, or others who wish to have dealings with him, from so doing, all resulting in serious injury to plaintiff's business or in its ultimate ruin, a proper case is presented for the interference of equity, and in such cases injunctions are freely granted, the writ itself being framed in such form as best to meet the exigencies and requirements of the particular occasion.<sup>5</sup> Such acts are fre-

Council, 53 N. J. Eq., 101, 30 Atl., 881; *Frank v. Herold*, 63 N. J. Eq., 443, 52 Atl., 152; *Hopkins v. Oxley Stave Co.*, 28 C. C. A., 99, 83 Fed., 912; *Casey v. Cincinnati Typographical Union*, 45 Fed., 135, 12 L. R. A., 193; *Coeur d'Alene C. M. Co. v. Miners' Union*, 51 Fed., 260, 19 L. R. A., 382; *Allis-Chalmers Co. v. Reliable Lodge*, 111 Fed., 264; *United States v. Haggerty*, 116 Fed., 510.

<sup>4</sup> In *Otis Steel Co. v. Local Union*, 110 Fed., 698, picketing is defined as "the establishment and maintenance of an organized espionage upon plaintiff's place of

business, and upon those going to and from it."

<sup>5</sup> *Beck v. Ry. Teamsters Union*, 118 Mich., 497, 77 N. W., 13, 42 L. R. A., 407, 74 Am. St. Rep., 421; *United States H. Co. v. Iron Molders' Union*, 129 Mich., 354, 88 N. W., 889; *Cumberland Glass Mfg. Co. v. G. B. B. Assn.*, 59 N. J. Eq., 49, 46 Atl., 208; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq., 759, 53 Atl., 230; *Vegelahn v. Gunther*, 167 Mass., 92, 44 N. E., 1077, 57 Am. St. Rep., 443; *Hamilton-Brown S. Co. v. Saxey*, 131 Mo., 212, 32 S. W., 1106, 52 Am. St. Rep., 622; *O'Neil v. Behanna*, 182

quently in the nature of a nuisance and the relief in such cases is allowed upon principles similar to those which govern in the case of nuisances.<sup>6</sup> And a preliminary injunction granted in such cases should not ordinarily be dissolved upon *ex parte* affidavits.<sup>7</sup>

§ 1415 *d.* **Actual violence not necessary to justify relief; writ not limited to intimidating employees under contract.** It is not essential, where relief is sought against the maintenance of a system of picketing or against other such interference with one's business upon the part of strikers, that the defendants and those acting with them should be guilty of actual physical violence in order to justify the granting of an injunction, but it is regarded as sufficient if there is such a suggestion or display of force as to result in moral intimidation and coercion and in forcing a person of reasonable and

Pa. St., 236, 37 Atl., 843, 38 L. R. A., 382, 61 Am. St. Rep., 702; Coeur d'Alene C. M. Co. v. Miners' Union, 51 Fed., 260, 19 L. R. A., 382; Consolidated S. & W. Co. v. Murray, 80 Fed., 811; American Steel & Wire Co. v. Wire Drawers' Union, 90 Fed., 608; Otis Steel Co. v. Local Union, 110 Fed., 698; Allis-Chalmers Co. v. Reliable Lodge, 111 Fed., 264; Reinecke C. M. Co. v. Wood, 112 Fed., 477; United States v. Haggerty, 116 Fed., 510; Union Pac. R. Co. v. Ruef, 120 Fed., 102; Knudsen v. Benn, 123 Fed., 636; Wicks China Co. v. Brown, 164 Pa. St., 449, 30 Atl., 261; Murdock v. Walker, 152 Pa. St., 595, 25 Atl., 492; Christensen v. Kellogg Switchboard & S. Co., 110 Ill. App., 61. As to the form and wording of the injunction, see, among other cases, Beck v. Ry. Teamsters' Union, 118 Mich., 497, 77 N. W., 13, 42 L. R. A., 407, 74 Am. St. Rep., 421; Jer-

sey City Printing Co. v. Cassidy, 63 N. J. Eq., 759, 53 Atl., 230; My Maryland Lodge v. Adt, (Md. 1905) 59 Atl., 721; Christensen v. Kellogg Switchboard & S. Co., 110 Ill. App., 61. In England, under the provisions of the Conspiracy and Protection of Property Act of 1875, all picketing is declared to be unlawful except where conducted merely for the purpose of obtaining or communicating information, and an injunction will accordingly lie to restrain it. Lyons v. Wilkins, (1896) 1 Ch., 811, 65 L. J. N. S. Ch., 601.

<sup>6</sup> American Steel & Wire Co. v. Wire Drawers' Union, 90 Fed., 608; Otis Steel Co. v. Local Union, 110 Fed., 698; Sherry v. Perkins, 147 Mass., 212, 17 N. E., 307; Vegelahn v. Gunther, 167 Mass., 92, 44 N. E., 1077, 57 Am. St. Rep., 443.

<sup>7</sup> Jersey City Printing Co. v. Cassidy, 63 N. J. Eq., 759, 53 Atl., 230.

ordinary courage to a course which he would otherwise not pursue.<sup>8</sup> Nor is it a defense to the issuing of the writ that the defendants have been instructed by their leaders or those in authority over them to conduct themselves in a peaceable and orderly manner, if coercive measures are in fact resorted to and intimidation results.<sup>9</sup> Nor should the injunction be limited so as to relate to the intimidation of such persons only as are in plaintiff's employ under binding contracts to remain with him, but it should be broad enough to include all persons who are in his employ, whether under contract or not, and all persons who wish to enter his employ.<sup>10</sup>

§ 1415 *e.* **Injunctions against boycotts; violence need not accompany boycott; trades union may enjoin boycott by another.** Injunctions are also frequently granted to restrain the carrying out of combinations or conspiracies, upon the part of strikers and those acting with them, to establish what is commonly known as a boycott of plaintiff's business. And where plaintiff's employees, who have gone on a strike, are distributing circulars and notices among his customers or among the public at large, urging them to cease trading with the plaintiff or to cease having any business transactions with him, under threats

<sup>8</sup> *O'Neil v. Behanna*, 182 Pa. St., 236, 37 Atl., 843, 38 L. R. A., 382, 61 Am. St. Rep., 702; *Union Pac. R. Co. v. Ruef*, 120 Fed., 102; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq., 759, 53 Atl., 230; *Vegelahn v. Gunther*, 167 Mass., 92, 44 N. E., 1077, 57 Am. St. Rep., 443; *American Steel & Wire Co. v. Wire Drawers' Union*, 90 Fed., 608; *Otis Steel Co. v. Local Union*, 110 Fed., 698; *Union Pac. R. Co. v. Ruef*, 120 Fed., 102. In *O'Neil v. Behanna*, *supra*, Mitchell, J., uses the following language: "The strikers and their counsel seem to think that the former could do anything to attain their ends,

short of actual physical violence. This is a most serious misconception. The 'arguments' and 'persuasion' and 'appeals' of a hostile and demonstrative mob have a potency over men of ordinary nerve which far exceeds the limits of lawfulness. The display of force, though none is actually used, is intimidation, and as much unlawful as violence itself."

<sup>9</sup> *Union Pac. R. Co. v. Ruef*, 120 Fed., 102; *Cumberland Glass Mfg. Co. v. G. B. B. Assn.*, 59 N. J. Eq., 49, 46 Atl., 208.

<sup>10</sup> *Vegelahn v. Gunther*, 167 Mass., 92, 44 N. E., 1077, 57 Am. St. Rep., 443.

or intimations of harmful consequences which will follow their failure to comply with such demands, thereby causing serious injury to plaintiff's business or its ultimate ruin, a proper case is presented for the interposition of equity by injunction.<sup>11</sup> And where defendants are thus engaged in carrying out a conspiracy the purpose and result of which will be the ruin of plaintiff's business, the remedy at law in an action for libel is not regarded as affording relief commensurate with the wrong inflicted; nor does the granting of the injunction in any way impair the constitutional guaranty of freedom of speech.<sup>12</sup> And where defendants are threatening plaintiff's customers with a boycott of their business if they continue to deal with the plaintiff, actual violence need not accompany the boycott, in order to justify the granting of relief by injunction, since the prospective injury which will result to

<sup>11</sup> *Beck v. Railway Teamsters' Union*, 118 Mich., 497, 77 N. W., 13, 42 L. R. A., 407, 74 Am. St. Rep., 421; *Casey v. Cincinnati Typographical Union*, 45 Fed., 135, 12 L. R. A., 193; *Barr v. Essex Trades Council*, 53 N. J. Eq., 101, 30 Atl., 881; *Hopkins v. Oxley Stave Co.*, 28 C. C. A., 99, 83 Fed., 912; *My Maryland Lodge v. Adt*, (Md. 1905) 59 Atl., 721. In *Marx Clothing Co. v. Watson*, 168 Mo., 133, 67 S. W., 391, 56 L. R. A., 951, 90 Am. St. Rep., 440, a contrary view was adopted, the court denying the relief upon the ground that the granting of the writ would result in depriving defendants of their constitutional right of the freedom of speech. And in *Brown v. Jacobs Pharmacy Co.*, 115 Ga., 429, 41 S. E., 553, 57 L. R. A., 547, 90 Am. St. Rep., 126, an injunction was granted to restrain the members of an association of druggists from boycotting plaintiff's business

because of his refusal to join the association, which had as its object the control and maintenance of the price of goods dealt in by members of the organization. And in *Hawarden v. Youghioghény & Lehigh Coal Co.*, 111 Wis., 545, 87 N. W., 472, 55 L. R. A., 828, it was held that an injunction should be granted to restrain certain wholesalers and retailers, who were engaged in the business of selling coal, from carrying out a conspiracy by which the wholesalers were to sell only to the retailers with whom they were conspiring, their object being to force out of business those retailers who were obnoxious to them and to create a monopoly in the coal business.

<sup>12</sup> *Beck v. Ry. Teamsters' Union*, 118 Mich., 497, 77 N. W., 13, 42 L. R. A., 407, 74 Am. St. Rep., 421; *Casey v. Cincinnati Typographical Union*, 45 Fed., 135, 12 L. R. A., 193.



those customers from such a boycott is of itself a sufficient intimidation to compel them to cease doing business with the plaintiff; nor need their fear be greater than is necessary to overcome their judgment and induce them to do what otherwise they would not have done.<sup>13</sup> And the members of one labor union may enjoin another union, from which they have withdrawn, from carrying out a conspiracy by which they are attempting to induce plaintiffs' employers to discharge the plaintiffs upon their failure to return to the defendants' union, where the defendants are accompanying their efforts with suggestions and intimations of trouble which will follow the failure or refusal of the employers to accede to such demands.<sup>14</sup>

§ 1415 *f*. **Substantial injury must be shown; mere apprehension not sufficient; strike practically over.** In order to entitle plaintiff to relief by injunction against unlawful interference with his business, whether it be in the form of picketing, boycotting or otherwise, positive and substantial injury must be shown, and where it appears that the injury is not of an irreparable nature and that the wrongs suffered by the plaintiff may be fully and adequately redressed in an action at law for the recovery of damages, relief by injunction should

<sup>13</sup> *Barr v. Essex Trades Council*, 53 N. J. Eq., 101, 30 Atl., 881; *Beck v. Ry. Teamsters' Union*, 118 Mich., 497, 77 N. W., 13, 42 L. R. A., 407, 74 Am. St. Rep., 421. In this case Grant, Ch. J., says: "The boycott condemned by law is not alone that accompanied by violence and threats of violence, but that where the means used are threatening in their nature, and intended and naturally tend to overcome by fear of loss of property the will of others, and compel them to do things which they would not otherwise do."

<sup>14</sup> *Plant v. Woods*, 176 Mass., 492, 57 N. E., 1011, 51 L. R. A., 339. But in *Worthington v. Waring*, 157 Mass., 421, 32 N. E., 744, 20 L. R. A., 342, it was held that a combination or conspiracy upon the part of employers not to re-employ defendants who had gone on a strike and to prevent them from obtaining employment could not be restrained since the right to employment is a purely personal right as distinguished from a property right with which alone equity is concerned.

be denied.<sup>15</sup> Nor is the mere apprehension of future injury sufficient to justify the granting of the writ.<sup>16</sup> And where the strike from which the controversy has arisen is practically over and no direct or immediate injury is threatened, a final injunction should not be allowed.<sup>17</sup>

§ 1415 *g*. **Injunctions on behalf of United States; jurisdiction under act of July 2, 1890; jurisdiction independent of act.** The government of the United States may invoke the aid of its courts of equity to restrain all kinds of unlawful interference with the exercise by it of the powers conferred upon it by the constitution, where such interference amounts to a public nuisance. Accordingly where a body of strikers and their sympathizers are combining and conspiring together to obstruct and interfere with the interstate transportation of freight and with the passage of the United States mails, thereby causing serious inconvenience and injury to the public of such a nature as to amount to a public nuisance, the government is regarded as having such a property right or interest in the use of the mails and as owing such a duty to its citizens as will entitle it to an injunction to restrain such unlawful interference with the exercise of its public functions.<sup>18</sup> Moreover, the jurisdiction to interfere in such cases is expressly conferred by the provisions of the act of Congress of July 2, 1890, known as the Sherman anti-trust law.<sup>19</sup> And under this statute it is held that any combination, conspiracy or agreement upon the part of strikers and members

<sup>15</sup> *Longshore Printing Co. v. States v. Workingmen's Council*, Howell, 26 Ore., 527, 38 Pac., 547, 54 Fed., 994, 26 L. R. A., 158, affirmed 6 C. C. A., 258, 57 Fed., 85, 640; *Johnston Harvester Co. v.* 13 U. S. App., 426.

*Meinhardt*, 9 Abb. N. C., 393, affirmed 24 Hun, 489; *Sweeney v. Torrence*, 11 Pa. Co. Court, 497.

<sup>16</sup> *Reynolds v. Everett*, 144 N. Y., 189, 39 N. E., 72; *Sweeney v. Torrence*, 11 Pa. Co. Court, 497.

<sup>17</sup> *Reynolds v. Everett*, 144 N. Y., 189, 49 N. E., 72. But see *United*

<sup>18</sup> *In re Debs*, 158 U. S., 564, 15 Sup. Ct. Rep., 900.

<sup>19</sup> 26 Stat., 209, c. 647; 3 U. S. Comp. Stat. 1901, p. 3200. For other injunction cases under this statute, see, *ante*, § 1183 *c* and notes.

of labor unions which results in the restraint of trade or commerce among the several states is unlawful and will therefore be restrained by injunction in the federal courts. Thus, the relief has been allowed to enjoin defendants from combining together for the purpose of preventing a railroad, engaged in the interstate transportation of freight, from procuring employees to operate its road, or of inducing the employees of such road to leave its service for the purpose of crippling the road and obstructing its business.<sup>20</sup> So an injunction has been granted to restrain the members of a labor union from carrying out a combination or conspiracy, into which they have entered for the purpose of enforcing their demands, which has as its object the discontinuance of labor in all kinds of business in a city, including the business of transporting goods which are in transit through such city from one state to another.<sup>21</sup> It is to be observed, however, that the jurisdiction of the federal courts to entertain a bill filed at the instance of the United States for the purpose of preventing such illegal combinations and conspiracies is not derived exclusively from the statute in question but that it rests upon broader grounds and is founded upon principles heretofore discussed which permit the public authorities to invoke the aid of equity for the purpose of abating a public nuisance.<sup>22</sup>

§ 1415 *h*. **No defense that acts are criminal.** The defense most frequently interposed in the class of cases under discussion is that the combination or conspiracy, or other acts against which relief by injunction is sought are criminal in their nature and punishable as such, and that equity will not interfere with the enforcement of the criminal laws of the state by enjoining the commission of such acts. The rule is well established that where the conduct complained of will

<sup>20</sup> *United States v. Elliott*, 62 Fed., 801; *United States v. Agler*, 62 Fed., 824; *United States v. Elliott*, 64 Fed., 27.

*men's Council*, 54 Fed., 994, 26 L. R. A., 158, affirmed 6 C. C. A., 258, 57 Fed., 85, 13 U. S. App., 426.

<sup>22</sup> *In re Debs*, 158 U. S., 564, 600,

<sup>21</sup> *United States v. Working-* 15 Sup. Ct. Rep., 900, 912.

cause irreparable injury to property rights, for which there can be no adequate redress in a court of law, equity may properly interfere by injunction, and the fact that the same acts are declared to be crimes by the laws of the state and are punishable as such constitutes no defense to the issuing of the writ. Under such circumstances the court may properly grant relief, but in so doing, it acts solely for the purpose of protecting property rights from irreparable damage and it in no way interferes with the enforcement of the criminal laws of the state.<sup>23</sup>

§ 1415 i. **Injunctions against striking; peaceful persuasion; payment of money to plaintiff's employees; publishing names of subscribers to strike fund.** The action of strikers in leav-

<sup>23</sup> *Hamilton-Brown S. Co. v. Saxey*, 131 Mo., 212, 32 S. W., 1106, 52 Am. St. Rep., 622; *In re Debs*, 158 U. S., 564, 15 Sup. Ct. Rep., 900; *Vegelahn v. Gunther*, 167 Mass., 92, 44 N. E., 1077, 57 Am. St. Rep., 443; *Beck v. Ry. Teamsters' Union*, 118 Mich., 497, 77 N. W., 13, 42 L. R. A., 407, 74 Am. St. Rep., 421; *Cumberland Glass Mfg. Co. v. G. B. B. Assn.*, 59 N. J. Eq., 49, 46 Atl., 208; *Arthur v. Oakes*, 11 C. C. A., 209, 63 Fed., 310, 25 L. R. A., 214; *Coeur d'Alene C. M. Co. v. Miners' Union*, 51 Fed., 260, 19 L. R. A., 382; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed., 730, 19 L. R. A., 387; *United States v. Elliott*, 64 Fed., 27; *Consolidated S. & W. Co. v. Murray*, 80 Fed., 811; *Union Pac. R. Co. v. Ruef*, 120 Fed., 102; *Christensen v. Kellogg Switchboard & S. Co.*, 110 Ill. App., 61. And see, *ante*, § 20 a. In *Hamilton-Brown S. Co. v. Saxey*, *supra*, the Supreme Court of Missouri adopt the opinion of Valliant, J., who, upon overruling a demurrer to the bill in the lower

court, used the following language: "Passing now to the question relating to the particular jurisdiction of a court of equity, we are brought to face the proposition that a court of equity has no criminal jurisdiction, and will not interfere by injunction to prevent the commission of a crime. These two propositions are firmly established; and as to the first, that a court of equity has no criminal jurisdiction, there is no exception. As to the second, that a court of equity will not interfere by injunction to prevent the commission of a crime, that, too, is perhaps without exception when properly interpreted; but it is sometimes misinterpreted. When we say that a court of equity will never interfere by injunction to prevent the commission of a crime, we mean that it will not do so simply for the purpose of preventing a violation of a criminal law. But when the act complained of threatens an irreparable injury to the property of an individual, a court of equity will interfere to

ing the service of their employer, either singly or in large bodies, so long as they act in a peaceable and orderly manner, is perfectly lawful and therefore constitutes no ground for an injunction.<sup>24</sup> And it has accordingly been held error to enjoin the employees of a railroad company which was in the hands of a receiver from so quitting the service of the receiver with or without notice as to cripple the property or prevent or hinder the operation of the road.<sup>25</sup> Moreover striking employees or their sympathizers have the undoubted right, so long as they proceed in a peaceable and orderly manner, to resort to all methods of peaceful persuasion for the purpose of inducing plaintiff's employees to leave his service or those who wish to enter his employ from so doing. And accordingly, in the absence of threats, intimidation, violence or other unlawful coercive measures, an injunction will not lie to restrain such conduct upon the part of the defendants.<sup>26</sup> For the same reason equity will not enjoin strikers from offering to pay money to such of plaintiff's employees as are persuaded to leave his service; nor will the relief be granted to restrain the posting or publishing of the names of persons who refuse to subscribe to a fund which is being raised for the benefit of strikers and for the purpose of carrying on the strike.<sup>27</sup>

§ 1415 j. **Enjoining employees from leaving plaintiff's service; relief upon behalf of receiver of railroad.** Where, how-

prevent that injury, notwithstanding the act may also be a violation of a criminal law. In such a case the court does not interfere to prevent the commission of a crime, although that may incidentally result, but it exerts its force to protect the individual's property from destruction, and ignores entirely the criminal portion of the act. There can be no doubt of the jurisdiction of a court of equity in such a case."

<sup>24</sup> *Arthur v. Oakes*, 11 C. C. A.,

209, 63 Fed., 310, 25 L. R. A., 414; *Longshore Printing Co. v. Howell*, 26 Ore., 527, 38 Pac., 547, 28 L. R. A., 464, 46 Am. St. Rep., 640.

<sup>25</sup> *Arthur v. Oakes*, 11 C. C. A., 209, 63 Fed., 310, 25 L. R. A., 414.

<sup>26</sup> *Rogers v. Evarts*, 17 N. Y. Supp., 264; *Johnston Harvester Co. v. Meinhardt*, 9 Abb. N. C., 393, affirmed 24 Hun, 489. See *Knudsen v. Benn*, 123 Fed., 636.

<sup>27</sup> *Rogers v. Evarts*, 17 N. Y. Supp., 264.

ever, the element of conspiracy enters, a different case is presented, and, while a court of equity will not ordinarily compel the performance of purely personal services, it may nevertheless enjoin defendants, who are in the employ of the receiver of a railroad, from combining or conspiring together to quit the service of the receiver for the purpose of crippling the property in the receiver's hands and of hindering or preventing the operation of the road, where their acts are accompanied by force, threats or intimidation, or other unlawful means of coercing employees who do not join them or who wish to take their places.<sup>28</sup> And while a court of equity can not ordinarily prevent a man from leaving the employ of another, it may nevertheless interfere when he threatens to do so for the purpose of compelling his employer to do an unlawful act, as in the case of one railroad discriminating against another and refusing to afford it equal facilities for the interstate transportation of freight as required by the Interstate Commerce act.<sup>29</sup>

§ 1415 *k*. **Mandatory injunction.** Mandatory injunctions are occasionally granted for the purpose of undoing wrongs which have been committed by plaintiff's striking employees or by those acting in concert with them, where the case presented by the plaintiff is free from doubt and great damage will otherwise ensue. Thus, a preliminary mandatory injunction was granted at the instance of a railroad company to restrain another railroad, its officers, agents and employees from refusing to furnish to the complainant company, whose employees were on strike, the same facilities for the interstate transportation of freight as were extended to other railroads, in violation of the Interstate Commerce act.<sup>30</sup> So where the employees of a railroad company, while remaining in its

<sup>28</sup> *Arthur v. Oakes*, 11 C. C. A., 209, 63 Fed., 310, 25 L. R. A., 414.

<sup>29</sup> *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 54 Fed., 730, 19 L. R. A., 387. 24 Stat., 379.

<sup>30</sup> *Chicago, B. & Q. R. Co. v. Bur-*

*lington, C. R. & N. R. Co.*, 34 Fed., 481; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed., 730, 19 L. R. A., 387; *Same v. Same*, 54 Fed., 746, 19 L. R. A., 395.

employ, refuse to handle trains to which are attached the cars of another company whose employees are on strike, it was held that a mandatory injunction should issue requiring the defendants to perform all their regular and customary duties so long as they remained in the employ of the plaintiff railroad.<sup>31</sup> So a preliminary mandatory injunction may be granted to restrain the leader of a labor union from continuing in force any rule or order of the organization which commands any employee of a railroad company to refuse to handle cars of freight delivered to such railroad by another company whose employees have gone on a strike.<sup>32</sup>

§ 1415 *l*. **Parties bound by injunction.** The question as to the parties bound by injunctions granted to restrain unlawful acts committed by strikers or their sympathizers is one of great practical importance, since, as a rule, the persons who are combining together and whom it is sought to reach by injunction are so numerous as to render it impractical, if not impossible, to enumerate them all by name either in the bill or in the writ. And it may be stated as a general rule that where the injunction runs against certain named defendants and against all others who are their confederates or associates, or who are aiding or abetting or acting in concert with them, all persons who fall within the designated class and who have knowledge of the existence of the injunction, will be held amenable to the order of the court and will be bound thereby, even though they are not parties to the injunction suit and are not named either in the bill or in the writ. And where such persons, with knowledge of the existence of the injunction, either directly violate it themselves or aid and assist others in so doing, they will be held guilty of contempt of court and will be punished accordingly.<sup>33</sup> Thus, where

<sup>31</sup> *Southern California R. Co. v. Rutherford*, 62 Fed., 796.

<sup>32</sup> *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed., 730, 19 L. R. A., 387.

<sup>33</sup> *United States v. Agler*, 62 Fed., 824; *United States v. Elliott*, 64 Fed., 27; *Conkey Co. v. Russell*, 111 Fed., 417; *Ex parte Richards*, 117 Fed., 658; *Union Pac.*

defendants are residents of the same state as the plaintiff and a federal court could therefore not acquire jurisdiction to enjoin them in a proceeding in which they were sought to be made parties, it may nevertheless punish them as for a violation of its order where they have knowingly assisted others, over whom the federal court has acquired jurisdiction, in setting the injunction at naught.<sup>34</sup> And where the court is proceeding to punish persons, not parties to the suit, for thus violating its order, such persons will not be heard, in such a collateral proceeding, to question the jurisdiction of the court in the action in which the injunction was granted.<sup>35</sup>

§ 1415 *m*. **Practice in punishing for contempt.** The practice to which resort is usually had for the purpose of punishing persons charged with the violation of injunctions restraining unlawful acts committed by strikers and their sympathizers, as in other cases, is to issue a citation requiring the persons so charged to appear and show cause why they should not be punished for contempt of court.<sup>36</sup> And it would seem that an information may also be filed in such cases.<sup>37</sup>

*R. Co. v. Ruef*, 120 Fed., 102. The rule is recognized in *Bessette v. Conkey Co.*, 194 U. S., 324, 24 Sup. Ct. Rep., 665, and in *In re Reese*, 47 C. C. A., 87, 107 Fed., 942. And see, *post*, § 1440 *a*. For an enumeration of acts held to constitute a violation of strike injunctions, see *Ex parte Richards*, 117 Fed., p. 666. See, also, *United States v. Weber*, 114 Fed., 950; *United States v. Haggerty*, 116 Fed., 510.

<sup>34</sup> *Conkey Co. v. Russell*, 111 Fed., 417; *Ex parte Richards*, 117 Fed., 658.

<sup>35</sup> *In re Lennon*, 166 U. S., 548, 17 Sup. Ct. Rep., 658, 41 L. Ed., 1110; *Ex parte Richards*, 117 Fed., 658, 663; *Conkey Co. v. Russell*, 111 Fed., 417, 421.

<sup>36</sup> *In re Lennon*, 166 U. S., 548, 17 Sup. Ct. Rep., 658, 41 L. Ed., 1110; *Bessette v. Conkey Co.*, 194 U. S., 324, 24 Sup. Ct. Rep., 665; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed., 746, 19 L. R. A., 395; *Ex parte Richards*, 117 Fed., 658.

<sup>37</sup> *United States v. Agler*, 62 Fed., 824.



## CHAPTER XXIX.

### OF THE VIOLATION OF INJUNCTIONS.

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#### I. EFFECT OF THE WRIT AND ITS VIOLATION.

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§ 1416. Injunction must be observed, however erroneous; violation sole issue; failure to file bond. The granting of injunctions being justly regarded as one of the highest prerogatives of courts of equity, the most exact and implicit obedience is required from those against whom the mandate of the court is directed. With whatever irregularities the proceedings may be affected, or however erroneously the court may have acted

in granting the injunction in the first instance, it must be implicitly obeyed so long as it remains in existence, and the fact that it has been granted erroneously affords no justification or excuse for its violation before it has been properly dissolved.<sup>1</sup> And the party against whom an injunction issues will not be allowed to violate it on the ground of want of equity in the bill, since he is not at liberty to speculate upon the intention or decision of the court, or upon the equity of the bill, or to question the authority of the court to grant relief upon the facts stated, except upon application to dissolve the injunction.<sup>2</sup> So if defendant is in doubt as to the

<sup>1</sup> *Moat v. Holbein*, 2 Edw. Ch., 188; *Partington v. Booth*, 3 Meriv., 148; *Rogers Manufacturing Co. v. Rogers*, 38 Conn., 121; *Woodward v. Earl of Lincoln*, 3 Swanst., 626; *People v. Sturtevant*, 9 N. Y., 263; *Sullivan v. Judah*, 4 Paige, 444; *People v. Van Buren*, 136 N. Y., 254, 32 N. E., 775, 20 L. R. A., 446; *Richards v. West*, 2 Green Ch., 456; *Cape May & S. L. R. Co. v. Johnson*, 35 N. J. Eq., 422; *Fleming v. Patterson*, 99 N. C., 404, 6 S. E., 396; *Billard v. Erhart*, 35 Kan., 616, 12 Pac., 42; *State v. Pierce*, 51 Kan., 241, 32 Pac., 924; *Central Union T. Co. v. State*, 110 Ind., 203, 10 N. E., 922, 12 N. E., 136; *In re White*, 113 Cal., 282, 45 Pac., 323; *Loven v. The People*, 158 Ill., 159, 42 N. E., 82; *Wilber v. Wooley*, 44 Neb., 739, 62 N. W., 1095; *State v. Markuson*, 7 N. Dak., 155, 73 N. W., 82; *Silliman v. Whitmer*, 173 Pa. St., 401, 34 Atl., 56; *State v. Circuit Court*, 98 Wis., 143, 73 N. W., 788; *Laramie National Bank v. Steinhoff*, 7 Wyo., 464, 53 Pac., 299. And see *Fennings v. Humphrey*, 4 Beav., 1; *Blake v. Blake*, 7 Beav., 514;

*Chuck v. Cremer*, 2 Ph., 113; *Erie Co. v. Ramsey*, 45 N. Y., 637, affirming S. C., 3 Lans., 178; *Mayor v. New York & S. I. F. Co.*, 64 N. Y., 623; *State v. Harpers Ferry B. Co.*, 16 West Va., 864. But see, *contra*, *Calvert v. State*, 34 Neb., 616, 52 N. W., 687, where, although the court had jurisdiction of the parties and of the subject matter, defendant was held not guilty of contempt for the violation of a temporary injunction which had been erroneously and improvidently granted. The preliminary injunction was held to be void because it changed the possession of property from one party to the other. In *Loven v. The People*, *supra*, where defendant was enjoined from in any manner corresponding with plaintiff's agents and customers, it was held no defense in a contempt proceeding that such agents and customers opened the correspondence and that defendant's letters were merely in reply, nor that such persons were not mentioned by name.

<sup>2</sup> *Richards v. West*, 2 Green Ch.,

scope or extent of the injunction he should not wilfully disregard or violate it with a view of testing such questions, but should apply to the court for a modification or construction of its order.<sup>3</sup> And upon proceedings for contempt in this class of cases the only legitimate inquiry is whether the court granting the injunction had jurisdiction of the parties and of the subject-matter, and whether it made the order which has been violated, and the court will not, in such proceedings, consider whether the order was erroneous.<sup>4</sup> So it is no defense to contempt proceedings that the bill is demurrable or that it is defective for want of a prayer for process.<sup>5</sup> And where a temporary injunction had been granted upon the filing of a bond and afterward new defendants were brought in by amendment and served with the injunction, but no additional bond was filed, the failure to file such new bond is no defense to contempt proceedings against such new defendants, since their remedy was by application to the court to dissolve the injunction.<sup>6</sup> And in contempt proceedings, the violation of the injunction is the sole issue involved, and accordingly where a question involving the rights of the parties has been expressly left undecided in the injunction order, such question can not be litigated in a contempt proceeding, since the only inquiry before the court is whether or not the defendant has complied with the terms of the decree.<sup>7</sup>

§ 1417. **Reason for the rule.** The reason for the rule as here laid down is found in the necessity of preserving the respect and obedience due to the mandates of equity, and of preventing the disastrous confusion which would inevitably result from allowing parties against whom injunctions were

456; *Sullivan v. Judah*, 4 Paige, Court, 98 Wis., 143, 73 N. W., 788.  
444; *State v. Circuit Court*, 98 <sup>5</sup> *United States v. Agler*, 62 Fed.,  
Wis., 143, 73 N. W., 788. 824.

<sup>3</sup> *Wells v. Oregon R. & N. Co.*, 19 <sup>6</sup> *State v. District Court of*  
Fed., 20; *Rodgers v. Pitt*, 89 Fed., Mower County, 78 Minn., 464, 81  
424. N. W., 323.

<sup>4</sup> *State v. Baldwin*, 57 Iowa, 266, <sup>7</sup> *Hamlin v. N. Y., N. H. & H. R.*  
10 N. W., 645; *State v. Circuit Co.*, 170 Mass., 548, 49 N. E., 922.

issued to be themselves the judges of the propriety of the relief, or of the regularity of the proceedings. From the nature of the case, the tribunal granting the relief must itself be the arbiter, and its mandates are to be strictly observed until properly revoked. And if the court granting the relief had jurisdiction of the subject-matter, the fact that its power was erroneously exercised does not render the injunction void, but only voidable, and until it is set aside or revoked it is entitled to implicit obedience.<sup>8</sup> And the fact that the injunction was too broad in its terms, and covered property over which it should not have been extended, affords no excuse for its violation.<sup>9</sup> Nor does the fact that the injunction was broader in its terms than the prayer of the bill warrant a defendant in disregarding it, since although irregular it is not void, and must be obeyed while in existence.<sup>10</sup> But, while a court may properly punish the violation of its injunction, although it was improperly awarded, it should not in such case compel the offender to pay to the plaintiff who obtained the injunction any sum as an indemnity, since the plaintiff was not entitled to the relief which he procured.<sup>11</sup>

§ 1418. **Violation a contempt of court regardless of motive; motive considered in awarding punishment.** The violation of an injunction constitutes a contempt of the court from which it issued, and will be punished accordingly.<sup>12</sup> Nor does the question of the motive or intent with which the writ was disobeyed alter or vary the responsibility for the violation; on

<sup>8</sup> *People v. Sturtevant*, 9 N. Y., 263.

<sup>9</sup> *Richards v. West*, 2 Green Ch., 456.

<sup>10</sup> *Mayor v. New York & S. I. F. Co.*, 64 N. Y., 623; *State v. Markuson*, 7 N. Dak., 155, 73 N. W., 82; *Loven v. The People*, 158 Ill., 159, 42 N. E., 82.

<sup>11</sup> *Kaehler v. Dobberpuhl*, 56 Wis., 497, 14 N. W., 631; *Kaeh-*

*ler v. Halpin*, 59 Wis., 40, 17 N. W., 868.

<sup>12</sup> *People v. Sturtevant*, 9 N. Y., 263; *Richards v. West*, 2 Green Ch., 456; *People v. Spalding*, 2 Paige, 326; *Commercial Bank v. Waters*, 10 Miss., 559; *Monroe v. Harkness*, 1 Cranch C. C., 157; *Monroe v. Bradley*, *Ib.*, 158; *Mead v. Norris*, 21 Wis., 310.

the contrary, it may be stated as a general rule, that where the writ has been duly served on defendants, they are liable for its violation, in whatever capacity or from whatever motive they may have acted.<sup>13</sup> But while, as we have seen in the preceding sections, the fact that an injunction was erroneously issued in the first instance affords no warrant or excuse to a defendant for a breach of its terms, yet such fact may properly be taken into consideration in awarding punishment for the breach.<sup>14</sup> Thus, where an injunction, irregularly and improperly issued in the first instance, has been violated by a defendant and his attorneys, the court may, on account of such irregularity, refuse to commit them for the breach, although requiring them to pay the costs thereby incurred, as well as the costs of the motion for committal.<sup>15</sup> And it has even been held, where the injunction was broader in its terms than was contemplated by the bill, that on motion for an attachment for a violation the defendant should not be punished for disobeying so much of the writ as went further than the bill.<sup>16</sup> But a mere disclaimer by one who has violated an injunction of all intention to commit a contempt of court when the contempt is of a constructive nature, will not necessarily purge him of contempt, although it may be considered with reference to the nature of the penalty to be imposed.<sup>17</sup>

§ 1419. **Defendant's guilt must be clearly established.** Where proceedings in attachment are instituted to punish a

<sup>13</sup> *Quackenbush v. Van Riper*, 2 Green Ch., 350; *Wilcox S. P. Co. v. Schimmel*, 59 Mich., 524, 26 N. W., 692; *Thompson v. Penn. R. Co.*, 48 N. J. Eq., 105, 21 Atl., 182; *Thistlethwaite v. State*, 149 Ind., 319, 49 N. E., 156; *Laramie National Bank v. Steinhoff*, 7 Wyo., 464, 53 Pac., 299; *Rodgers v. Pitt*, 89 Fed., 424.

<sup>14</sup> *Sullivan v. Judah*, 4 Paige, 444; *Cape May & S. L. R. Co. v. Johnson*, 35 N. J. Eq., 422; *State*

*v. Circuit Court*, 98 Wis., 143, 73 N. W., 788; *Laramie National Bank v. Steinhoff*, 7 Wyo., 464, 53 Pac., 299.

<sup>15</sup> *Partington v. Booth*, 3 Meriv., 148.

<sup>16</sup> *Freeman v. Deming*, 4 Edw. Ch., 598.

<sup>17</sup> *Watson v. Citizens Savings Bank*, 5 S. C., 159. But see *Postal Telegraph Co. v. N. & W. R. Co.*, 88 Va., 929, 14 S. E., 691.

defendant for breach of an injunction, the fact of his guilt must be clearly and explicitly established to the satisfaction of the court. But, while the injunction must be implicitly obeyed, it is the spirit and not the strict letter of the mandate to which obedience is exacted, and complainant failing to prove a violation of this to the satisfaction of the court, the rule for an attachment for contempt will be discharged.<sup>18</sup>

§ 1420. **Advice of counsel no defense.** As regards the rights of persons affected by an injunction, the fact that defendant has violated the mandate of the court under the advice of counsel constitutes no sufficient ground of defense in his favor. We have already seen that the motive with which the breach is committed constitutes no excuse for the wrongful act,<sup>19</sup> and equity will protect persons affected by the writ from any violation of its terms, even though committed under the sanction and advice of counsel.<sup>20</sup> Thus, where defendant has committed a breach of the injunction, he can not relieve himself from the responsibility for his conduct by the fact that it was committed under the advice of counsel that the service of the writ was defective, the officer not having exhibited the original writ, but only a copy thereof.<sup>21</sup> So where defendant, who has been served in person with a written notice that an order for an injunction against him has been made, proceeds with the commission of the acts enjoined, claiming to act under

<sup>18</sup> *Magennis v. Parkhurst*, 3 Green Ch., 433; *Probasco v. Probasco*, 3 Stew., 61. See also, *Wisconsin C. R. Co. v. Smith*, 52 Wis., 140, 8 N. W., 613; *Smith v. Halkyard*, 19 Fed., 602.

<sup>19</sup> *Supra*, § 1418.

<sup>20</sup> *Mead v. Norris*, 21 Wis., 310; *Hawley v. Bennett*, 4 Paige, 163; *Lansing v. Easton*, 7 Paige, 364; *McKillopp v. Taylor*, 10 C. E. Green, 139; *Cape May & S. L. R. Co. v. Johnson*, 35 N. J. Eq., 422; *Columbia Water Power Co. v. Co-*

*lumbia*, 4 S. C., 388; *Green v. Griffin*, 95 N. C., 50; *Lindsay v. Hatch*, 85 Iowa, 332, 52 N. W., 226; *Laramie National Bank v. Steinhoff*, 7 Wyo., 464, 53 Pac., 299; *Société Anonyme v. Western Distilling Co.*, 42 Fed., 96; *Pokegama Lumber Co. v. Klamath Lumber Co.*, 86 Fed., 538; *Rodgers v. Pitt*, 89 Fed., 424. And see *State v. Harpers Ferry B. Co.*, 16 West Va., 864.

<sup>21</sup> *Mead v. Norris*, 21 Wis., 310.

the advice of counsel that such notice was ineffectual to bind him, he is regarded as violating the injunction.<sup>22</sup> So the advice of counsel to the effect that an appeal and the filing of a supersedeas bond has had the effect of suspending a preliminary injunction, constitutes no defense to contempt proceedings for the violation of the injunction.<sup>23</sup> It is observed, however, that while the fact of defendant having committed the breach under the advice of counsel that he might safely disregard the writ affords no justification for his conduct, yet if such advice be given in good faith it may properly be taken into account in determining the degree of punishment to be inflicted for the breach, and may thus palliate, although it can not justify the violation.<sup>24</sup>

§ 1421. **Injunction becomes operative from the granting of the order.** In considering the question of a defendant's liability for a breach of injunction, it is to be borne in mind that the injunction becomes operative from the time of the order being made, and not from the date of the writ itself, or from the time of its being drawn up.<sup>25</sup> The mandate of the court being effectual upon all parties having notice thereof from the time it is given, to fix defendant's liability for a violation it is only necessary to show that he was actually apprised of the existence of the order at the time of committing the acts constituting the violation.<sup>26</sup> Thus, where an in-

<sup>22</sup> *Kimpton v. Eve*, 2 Ves. & B., 349.      solidated Stage Co., 18 Ab. Pr., 429.

<sup>23</sup> *Lindsay v. Hatch*, 85 Iowa, 332, 52 N. W., 226.

<sup>24</sup> *Erie Co. v. Ramsey*, 45 N. Y., 637, affirming S. C., 3 Lans., 178; *Coffey v. Gamble*, 117 Iowa, 545, 91 N. W., 813; *Pokegama Lumber Co. v. Klamath Lumber Co.*, 86 Fed., 538; *Rodgers v. Pitt*, 89 Fed., 424. See also, *Columbia Water Power Co. v. Columbia*, 4 S. C., 388; *Smith v. New York Con-*

<sup>25</sup> *McNeil v. Garratt*, 1 Cr. & Ph., 98; *James v. Downes*, 18 Ves., 522; *Mining Co. of Ireland v. Delany*, 21 L. R. Ir., 8; *Lake Shore & Michigan Southern Ry. Co. v. Taylor*, 134 Ill., 603, 25 N. E., 588. And see *Hearn v. Tennant*, 14 Ves., 136.

<sup>26</sup> *Vansandau v. Rose*, 2 Jac. & W., 264; *United Telephone Co. v. Dale*, 25 Ch. D., 778; *Fowler v.*

junction is granted to restrain the commission of waste, and before the writ actually issues, or the order is drawn up, defendant is notified of the order, and its purport and effect are verbally explained to him, the cutting of timber after such notice constitutes a breach of the injunction.<sup>27</sup> So where an injunction is ordered against the commission of waste and the sale of crops, and the defendant is served with written notice thereof, but proceeds to sell in disregard of the notice, although admitting his belief that the order was made, he is guilty of a violation of the mandate of the court, even though he claims to have acted under the advice of counsel.<sup>28</sup> So where a deputy sheriff has read a copy of the injunction decree to defendants and delivered them a copy, they are bound thereby, although

Beckman, 66 N. H., 424, 30 Atl., 1117. And see *Gooch v. Marshall*, 8 W. R., 410.

<sup>27</sup> *Vansandau v. Rose*, 2 Jac. & W., 264. And see *Gooch v. Marshall*, 8 W. R., 410.

<sup>28</sup> *Kimpton v. Eve*, 2 Ves. & B., 349. This was an injunction against the commission of waste and the sale of straw and standing crops, defendant having proceeded to a sale after personal service upon him of a written notice that an order for the writ was granted. Defendant, by his affidavit, admitted his belief that the order had been made, but claimed to have acted by the advice of his solicitor, to the effect that a mere notice of the order had no binding force. Eldon, Lord Chancellor, observes: " \* \* \* It is true that before Lord Hardwicke's time, who first made the exception of the case of a party actually present in court, hearing the order made, actual service of the injunction was required. Lord Hard-

wicke, I suppose, felt the enormous mischief of permitting a man, hearing an order pronounced restraining him from doing an act, to walk out of court and immediately do that act, before service of the injunction. But if that extension of the practice was right, the court could not stop short, refusing to apply the principle in other cases affording the same necessity for its application. I have heard some of my predecessors in this place treat as a great abuse of justice and want of consistency the refusal to apply that practice, which is applied to a person present in court and hearing the order, to a man standing outside of the court, and informed by some one who heard it that the order was pronounced. \* \* \* In this case, the party admitting that he believed the order was made, the principle is the same as if his belief was formed from information short of actual service."



no writ or other process under seal has been issued against them.<sup>29</sup>

§ 1422. **Defendant need not be officially apprised of writ; any actual notice sufficient to bind him; service of summons unnecessary; parties must take notice.** Any means of information whereby notice of the order is actually brought to the knowledge of the parties enjoined would seem sufficient to meet the requirements of the rule above laid down. And the courts have uniformly held that it is not requisite that a defendant, against whom an injunction has issued, should be officially apprised of its existence, or be served with process in the cause to render him liable to contempt in committing a breach of the injunction. If defendant is informed of the existence of the order, although not yet served with process, it becomes operative upon him, and he will not be allowed to disregard or violate it. It is enough to show that he has had actual notice of the existence of the writ, or of the order of the court that it should issue.<sup>30</sup> Nor is it necessary in such case that defendant should have been served with process.<sup>31</sup> And one who has received notice of the order for an injunction may be guilty of a breach of the mandate of the court and may be punished for contempt, even though the writ has not yet issued. Otherwise, the opportunity would be afforded of committing with impunity violations of the injunction between the time of

<sup>29</sup> *Fowler v. Beckman*, 66 N. H., 424, 30 Atl., 1117.

<sup>30</sup> *Hull v. Thomas*, 3 Edw. Ch., 236; *Howe v. Willard*, 40 Vt., 654; *Poertner v. Russell*, 33 Wis., 193; *Fleming v. Patterson*, 99 N. C., 404, 6 S. E., 396; *Farnsworth v. Powel v. Follet, Dick.*, 116; *Murwood*, 3 Atk., 564; *Anon.*, Ib., 567; *Powel v. Follet, Dick.*, 116; *Murphey v. Harker*, 115 Ga., 77, 41 S. E., 585; *Lake Shore & Michigan Southern Ry. Co. v. Taylor*, 134 Ill., 603, 25 N. E., 588; *Kempson v. Kempson*, 61 N. J. Eq., 303, 48 Atl., 244, modified and affirmed in 63 N. J. Eq., 783, 52 Atl., 360, 625; *Fowler v. Beckman*, 66 N. H., 424, 30 Atl., 1117; *Ex parte Richards*, 117 Fed., 658. And see *Woodward v. King, Dick.*, 797; *Hearn v. Tennant*, 14 Ves., 136; *McNeil v. Garratt*, 1 Cr. & Ph., 98; *Osborn v. Glasscock*, 39 West Va., 749, 20 S. E., 702; *Hawks v. Fellows*, 108 Iowa, 133, 78 N. W., 812.

<sup>31</sup> *Ex parte Richards*, 117 Fed., 658.

ordering the writ and the time of its issuing, and thus the very acts would be permitted which it is the object of the injunction to prevent.<sup>32</sup> And where an order of injunction is embodied in and forms a part of a decree rendered in regular course after a hearing upon issue joined, parties to the suit are bound to take notice of such order and are not entitled to have a certified copy of the order served upon them before being bound thereby.<sup>33</sup>

§ 1423. **Illustrations of the rule.** The rule as to the liability of a defendant for breach of an injunction upon notice of its existence, or of the order of the court, holds good even though there has been great negligence in serving the writ. And even where service has been delayed to such an extent as to constitute ground for a dissolution of the writ, he who violates it may still be attached for contempt.<sup>34</sup> So persons who remain in court during the argument of a motion for an injunction can not, by leaving the court just before the order for the writ is made, evade the consequences of a breach of the injunction, they having known that the writ was actually issued; and they will be punished for contempt for its violation, although they were not present when the order was actually pronounced.<sup>35</sup> And where one has not been officially apprised of the issuing of an injunction, but has been informed of it by one of the parties to the suit, he will nevertheless be guilty of a contempt should he violate the mandate of the court.<sup>36</sup>

§ 1424. **Notice by telegraph; injunction against corporation.** Notice by telegraph of the granting of an injunction is also deemed sufficient to render the defendant liable for contempt in disregarding it, although not formally served with the writ. Thus, a sheriff who proceeds with a sale of property under execution, after having actual knowledge of the proceedings in

<sup>32</sup> *McNeil v. Garratt*, 1 Cr. & Ph., 98.

<sup>33</sup> *Hawkins v. State*, 126 Ind., 294, 26 N. E., 43.

<sup>34</sup> *Howe v. Willard*, 40 Vt., 654.

<sup>35</sup> *Hearn v. Tennant*, 14 Ves., 136.

<sup>36</sup> *Hull v. Thomas*, 3 Edw. Ch., 236.

bankruptcy by the judgment debtor, and being informed of the injunction by telegraphic dispatch, violates the injunction by proceeding with the sale.<sup>37</sup> So when counsel obtaining an injunction notifies defendants who are enjoined, by telegraph, of the granting of the writ and warns them that its violation will be a contempt of court, defendants will be deemed guilty of contempt if they violate the injunction.<sup>38</sup> So where a judge, after granting an injunction, notifies plaintiff by telegram which is shown to defendants, they are guilty of contempt of court in disobeying the injunction.<sup>39</sup> So where an injunction issues against the president of a corporation, its officers and members, and is served upon the president in person, and is read aloud in the hearing of other officers and members, who afterward proceed with the performance of the act enjoined, they are guilty of a contempt of court, although never served with process in the cause or with the order of injunction.<sup>40</sup> And an injunction against a municipal corporation binds its officers or persons acting for it, who have notice of the writ and of its contents, although not parties to the suit, and they may be punished for its violation.<sup>41</sup> But it has been held that service of an injunction upon defendant's clerk in court is not such service as to render defendant liable in proceedings for a violation of the injunction.<sup>42</sup>

§ 1425. **Court must have jurisdiction; illustrations of rule.** While it is thus seen that courts of equity exact the most implicit obedience to the writ of injunction, and treat its wilful violation as a most flagrant contempt of court, the doctrine is to be understood with the qualification that the court has jurisdiction over the subject-matter in controversy. And

<sup>37</sup> *In re Bryant*, 4 Ch. D., 98. But see *Ex parte Langley*, 13 Ch. D., 110.

<sup>38</sup> *Cape May & S. L. R. Co. v. Johnson*, 35 N. J. Eq., 422.

<sup>39</sup> *State v. Knight*, 3 S. Dak., 509, 54 N. W., 412, 44 Am. St. Rep., 809.

<sup>40</sup> *Rorke v. Russell*, 2 Lans., 242.

<sup>41</sup> *Phillips v. City of Detroit*, 2 Flippin, 92.

<sup>42</sup> *Gooseman v. Dann*, 10 Sim., 518. But it does not appear from the case as reported whether defendant had actual knowledge of the injunction.

if the court has no jurisdiction over the matter involved, or if it has exceeded its powers by granting an injunction in a matter beyond its jurisdiction, its injunction will be treated as absolutely void, and defendants can not, in such case, be punished for contempt for its alleged violation.<sup>43</sup> For example, when an injunction is issued against a board of township officers to restrain them from holding an election which they are authorized by law to hold, equity having no jurisdiction to interfere in such case, there can be no disobedience of the injunction and no attachment for contempt, since the mandate of the court is absolutely void.<sup>44</sup> So where a court has exceeded its powers by granting an injunction in a matter over which it has no jurisdiction, as by enjoining a board of municipal officers from canvassing the returns of an election, the court having no power to hear or determine such controversies, its injunction will be treated as absolutely void, and a punishment inflicted for its violation will not be upheld.<sup>45</sup> So an injunction against the mayor and common council of a city, acting under an ordinance of the city, enjoining them from removing a city official from office upon charges of misconduct and malfeasance, is beyond the jurisdiction of a court of equity and hence absolutely void, and defendants are not guilty of contempt in disregarding it.<sup>46</sup> So where a court of equity has

<sup>43</sup> *Walton v. Develing*, 61 Ill., 201; *Darst v. The People*, 62 Ill., 306; *Andrews v. Knox Co.*, 70 Ill., 65; *Dickey v. Reed*, 78 Ill., 261; *Ex parte Wimberly*, 57 Miss., 437; *People v. Barrett*, 203 Ill., 99, 67 N. E., 742; *In re Sawyer*, 124 U. S., 200, 8 Sup. Ct. Rep., 482; *Morgan v. County Court*, 53 West Va., 372, 44 S. E., 182; *State v. Superior Court*, 105 Wis., 651, 81 N. W., 1046, 48 L. R. A., 819; *State v. Milligan*, 3 Wash., 144, 28 Pac., 369; *State v. Theard*, 48 La. An., 1448, 21 So., 28.

<sup>44</sup> *Walton v. Develing*, 61 Ill., 201; *Darst v. The People*, 62 Ill., 306. In such case, it is said, when the law imposes an absolute duty upon a public officer and the court commands him not to perform that duty, he must obey the law and disobey the order of the court.

<sup>45</sup> *Dickey v. Reed*, 78 Ill., 261; *People v. Barrett*, 203 Ill., 99, 67 N. E., 742. But see, *contra*, *People v. Dwyer*, 90 N. Y., 402.

<sup>46</sup> *In re Sawyer*, 124 U. S., 200, 8 Sup. Ct. Rep., 482.

issued an injunction restraining the mayor and common council of a city from passing an ordinance, such action is entirely beyond the jurisdiction of the court, and defendants can not be held for contempt in disobeying the writ.<sup>47</sup> So where a court has granted an injunction restraining proceedings under a criminal law of the state, which is beyond the jurisdiction of a court of equity to grant, the injunction is wholly void, and the court granting it may be restrained by a writ of prohibition from entertaining a rule for contempt for violation of its order.<sup>48</sup> And where the court granting the injunction is entirely without jurisdiction over the subject-matter, its judgment in imposing a fine in proceedings for contempt for disregarding the injunction will be reversed on appeal.<sup>49</sup> And it has been held that where a mandatory injunction is the sole relief sought, such an injunction, issued without notice, is void and defendants are not guilty of contempt in disregarding it.<sup>50</sup> The practice, however, of thus disregarding the solemn mandate of the court, although it be void, is not to be encouraged and, except in cases where serious injury might otherwise result, the aggrieved party would better resort to the more orderly method either of applying to the court for a dissolution of the injunction or of seeking relief by appeal.

§ 1426. **When attorneys guilty of contempt.** While the attorneys in a cause in which an injunction is granted, if not named in the order, may not be technically liable for its breach, yet under their general duty and relation to the court they are chargeable as for a contempt if they co-operate with the parties to violate the injunction and advise its violation. And where, in an action against a banking corporation to wind up its affairs upon the ground of insolvency, the officers and agents of the bank are enjoined from paying out its funds, or disposing of

<sup>47</sup> *State v. Superior Court*, 105 Wis., 651, 81 N. W., 1046, 48 L. R. A., 819.

<sup>48</sup> *State v. Theard*, 48 La. An., 1448, 21 So., 28.

<sup>49</sup> *Brewer v. Kidd*, 23 Mich., 440.

<sup>50</sup> *Weaver v. Touey*, 107 Ky., 419, 54 S. W., 732, 50 L. R. A., 105.

any of its property and effects, it is a contempt of court for the attorneys of the bank to advise it to file a petition in bankruptcy. Such a contempt is not, however, of so grave a nature as to warrant a suspension or removal of the attorneys from the bar.<sup>51</sup> And where an attorney is acting for two different clients, one of whom is enjoined, and the other, who occupies a different position, having different rights and interests, is not enjoined, it would seem that the attorney is not guilty of a violation of the injunction in advising the client who is not enjoined.<sup>52</sup> But an attorney who appears for the defendants who are enjoined and argues a motion to dissolve, which is overruled, and who afterward proceeds to perform the act which has been enjoined, can not justify his conduct upon the ground that in so doing he was acting as attorney for a third person not enjoined.<sup>53</sup>

§ 1427. **The general doctrine illustrated.** It is not proper for a defendant who has been enjoined to experiment with a view of determining how near he may come to a violation of the injunction without actually violating it.<sup>54</sup> Nor can persons who are plainly guilty of violating an injunction excuse themselves upon proceedings for attachment upon the ground that it was commonly rumored that the injunction had been dissolved, nor can they justify themselves upon the ground that other persons were doing the act which had been enjoined.<sup>55</sup> Indeed, the courts exact a strict and implicit obedience to their injunctions, and will not permit them to be defeated by mere subterfuges on the part of those who are required to obey them. Thus, where a ferry company is enjoined from running a ferry, and the president of the company, for the purpose of evading the writ, conveys to himself individually a ferry-boat, and con-

<sup>51</sup> *Watson v. Citizens Savings Bank*, 5 S. C., 159.      <sup>59</sup> *Mich.*, 524, 26 N. W., 692.

<sup>52</sup> *People v. Randall*, 73 N. Y., 416; *Slater v. Merritt*, 75 N. Y., 268.      <sup>54</sup> *Craig v. Fisher*, 2 Sawy., 345; *Stahl v. Ertel*, 62 Fed., 920; *Rodgers v. Pitt*, 89 Fed., 424.

<sup>55</sup> *Morris v. Hill*, 28 N. J. Eq.

<sup>53</sup> *Wilcox S. P. Co. v. Schimmel*, (1 Stew.), 33.

tinues to run it in that way, he may be punished for contempt in violating the injunction.<sup>56</sup> But where an injunction was granted to restrain a board of county supervisors from erecting a jail, and the board proceeded to pass a resolution and to make a contract for building the jail, conditioned upon the dissolution of the injunction, such action was held not to be a contempt of court.<sup>57</sup>

§ 1428. **Receiver of railroad, when guilty of contempt.** When a railroad company is enjoined in a state court from obstructing the streets of a city with its cars, and the company afterward passes into the hands of receivers appointed by a federal court, the injunction becomes operative upon such receivers, and they may be punished for contempt in its violation. Nor does the fact of their removal from their office or trust afford any excuse for a violation of the injunction before such removal. Nor is one of such receivers exonerated from responsibility for having violated the injunction by the fact that he took no active part in the management of the road, since he can not relieve himself from responsibility by merely remaining inactive and permitting others to violate the injunction.<sup>58</sup>

§ 1429. **Compliance with order by plaintiff necessary; conditional injunctions.** The question whether a breach of an injunction has actually been committed has been held to be dependent upon whether plaintiff in the action has complied with the terms upon which the relief was ordered. Thus, where an order has been obtained granting an injunction in restraint of a sale under execution, upon the usual terms of giving a bond to defendant for the payment of damages incurred, it is held that proceedings under the execution are not stayed until the conditions are complied with. And in such case it is held to be no contempt of court to proceed with a sale under the

<sup>56</sup> *Mayor v. New York & S. I. F. Co.*, 64 N. Y., 623.

<sup>57</sup> *Andrews v. Knox Co.*, 70 Ill., 65.

<sup>58</sup> *Safford v. The People*, 85 Ill., 558. To the same effect see *Steel v. Gordon*, 14 Wash., 521, 45 Pac., 151.

execution, notwithstanding the chancellor's order was shown to the plaintiff in execution and to the sheriff.<sup>59</sup> But upon proceedings for contempt a defendant can not escape the liability for his disregard of the injunction upon the ground that the court may have granted it without requiring a bond.<sup>60</sup> And while the rule is well established that one who has actual notice of an order for an injunction may be held guilty of contempt for its disobedience, even before the order is formally drawn up, yet when it is ordered that the injunction issue upon filing the bill, such order is conditional in its nature, and there is no injunction and consequently no contempt until the bill has been filed.<sup>61</sup> And it has been held under the statute of Alabama, that where an order is entered for an injunction upon the filing of a bond, the order is conditioned upon the filing of the bond, and until it is filed, the order is inoperative and there can be no violation of the injunction.<sup>62</sup>

§ 1430. **Habeas corpus.** If the court or officer granting the injunction has jurisdiction to make the order, and defendant is attached for contempt for its violation, upon proceedings by *habeas corpus* to test the regularity of his imprisonment under such attachment, the court will not consider any question relating to irregularities or omissions in the proceedings in which the injunction was granted. In such a case the only question to be considered is the question of jurisdiction of the officer by whom the injunction was granted, and that being clearly shown, defendant will not be permitted to avail himself of irregularities in the proceedings to procure his release from the attachment.<sup>63</sup>

§ 1431. **Doing act enjoined pending appeal; lower court and not reviewing court should punish for contempt.** An

<sup>59</sup> *Clarke v. Hoome's Ex'rs*, 2 Hen. & M., 23. See *Diehl v. Frierster*, 37 Ohio St., 473; *Forsythe v. Winans*, 44 Ohio St., 277, 7 N. E., 13.

<sup>60</sup> *Young v. Rollins*, 90 N. C., 125.

<sup>61</sup> *Winslow v. Nayson*, 113 Mass., 411.

<sup>62</sup> *Ex parte Miller*, 129 Ala., 130, 30 So., 611, 87 Am. St. Rep., 49.

<sup>63</sup> *In re Perry*, 30 Wis., 268.



appeal from a final injunction does not suspend its operation and the doing of the act enjoined may be punished as a contempt, notwithstanding such appeal.<sup>64</sup> And an appeal from an injunctive order does not deprive the court granting the writ of the right to punish for contempt for its violation, and the lower court and not the reviewing court is the proper tribunal to entertain such proceeding.<sup>65</sup> But when an interlocutory injunction is granted upon the filing of the bill, but the bill is dismissed upon the hearing, and plaintiffs thereupon appeal, the appeal does not have the effect of reviving the injunction; and defendants are not, therefore, liable for contempt in doing the act which had been originally enjoined, pending such appeal.<sup>66</sup> Where, however, under the practice of the state an appeal lies from an order dissolving a temporary injunction, and the appeal upon the giving of a bond operates to suspend the order of dissolution and to leave the injunction in full force, the court which granted the injunction still retains such jurisdiction of the matter as to authorize it to punish for contempt in disregarding the injunction pending the appeal.<sup>67</sup> But where the court of appeals of the state has jurisdiction to grant a *supersedeas* to an order of an inferior court dissolving an injunction, and defendants, after the granting of such *supersedeas*, proceed to the commission of the act forbidden by the injunction, such action is a contempt of the court of appeals and may be punished upon proceedings in that court.<sup>68</sup>

<sup>64</sup> *Central Union T. Co. v. State*, 110 Ind., 203, 10 N. E., 922, 12 N. E., 136; *Heinlen v. Cross*, 63 Cal., 44. And see *State v. Harness*, 42 West Va., 414, 26 S. E., 270. But see *Smith v. Western Union T. Co.*, 83 Ky., 269.

<sup>65</sup> *State v. Harness*, 42 West Va., 414, 26 S. E., 270.

<sup>66</sup> *Brevoort v. Detroit*, 24 Mich., 322. As to the effect of the violation of an injunction, pending

an appeal from a final judgment granting the injunction, pending which appeal an order is granted staying proceedings under the judgment, see *Sixth Avenue R. Co. v. Gilbert Elevated R. Co.*, 71 N. Y., 430.

<sup>67</sup> *State v. Houston*, 37 La. An., 852.

<sup>68</sup> *State v. Harpers Ferry B. Co.*, 16 West Va., 864.

§ 1431 *a*. **Injunction void for uncertainty; no contempt in violating.** A decree for an injunction which is so indefinite and uncertain as to be absolutely void can not be made the basis for contempt proceedings, and a defendant against whom such a decree purports to run can not be held guilty of contempt of court in disregarding it.<sup>69</sup>

<sup>69</sup> *In re Huntley*, 29 C. C. A., 468, 85 Fed., 889.

## II. WHAT CONSTITUTES A VIOLATION.

- § 1432. Injury to plaintiff's rights; creditors' suits.
1433. Regard must be had to terms of writ; injunction in general terms; half hearted attempt to comply insufficient.
1434. Injunctions against proceedings at law.
1435. Agents; stranger to cause; aiding another a violation; procuring violation by another.
1436. Assignee of *choses in action*; suit by trustees; dissolution in part.
1437. Breach need not be committed in person.
1438. Permitting violation by others a contempt.
1439. Disobedience under other authority not allowed.
1440. Obligation of injunction usually limited to parties named.
- 1440a. When persons not parties guilty of contempt; agents, servants and employees; aiders and abettors; grantee of defendant.
- 1440b. The same; distinction between criminal and remedial proceedings for contempt.
1441. Violation by attorney.
1442. Constructing railroad in violation of injunction.
1443. Injunctions against corporations, municipal and private.
1444. Defective service no excuse; misnomer of defendant; *idem sonans*.
1445. Right of way.
1446. Spirit of injunction to be regarded.
1447. Injunction not retroactive.
1448. Purchase of patented article; distribution of circulars for sale of infringing article.

§ 1432. **Injury to plaintiff's rights; creditors' suits.** It is frequently a matter of difficulty to decide what constitutes such a breach of an injunction as to warrant proceedings against a defendant for contempt. It has been laid down as a general rule, subject, however, to some exceptions, that the offense complained of as a violation must be injurious to the rights of the complainant in the action.<sup>1</sup> And where, after service of an injunction

<sup>1</sup> *Hudson v. Plets*, 11 Paige, 180; *Jessup Paper Co. v. Ford*, 7 Del. People v. Diedrich, 141 Ill., 665, Ch., 226, 44 Atl., 778. And see 30 N. E., 1038; *Dolese v. McDou-* *Parker v. Wakeman*, 10 Paige, 485. gall, 182 Ill., 486, 55 N. E., 547;

upon defendant in a creditor's suit, he proceeds to judgment in an action previously begun against a third person, such conduct is not regarded as a breach of the mandate of the court, since it can work no injury to complainants in the injunction suit, and may benefit them.<sup>2</sup> So, too, where an injunction has been granted on a creditor's bill, the fact of the debtor afterward bringing suit against a third person for a tort, the tort consisting in taking property of the debtor under execution, which was exempt by law, constitutes no violation of the injunction.<sup>3</sup> Where, however, the judgment debtor is enjoined in a creditor's suit for making any transfer or disposition of his property, and he afterwards gives to one of his creditors a draft upon third persons for his indebtedness due from them, the draft being given after the injunction, but in pursuance of an arrangement made before, the debtor is guilty of violating the mandate of the court.<sup>4</sup>

§ 1433. **Regard must be had to terms of writ; injunction in general terms; half hearted attempt to comply insufficient.** In determining whether an actual breach has been perpetrated, such as to warrant the court in committing for contempt, regard must be had to the terms of the injunction itself. And where the writ does not specifically restrain defendant from the commission of any definite act, but enjoins him in general terms from permitting certain injurious results to be produced by a particular cause, it must satisfactorily appear that the injurious result was actually produced by the given cause.<sup>5</sup> So also where an injunction is thus in general terms and does not specifically restrain any particular act, it must appear, in order to constitute a breach of the injunction, that the acts complained of were included within its scope.<sup>6</sup> But where the mandate of the court has been violated in spirit as well as in letter,

<sup>2</sup> *Parker v. Wakeman*, 10 Paige, 485.

also *Jewett v. Bowman*, 12 C. E. Green, 171.

<sup>3</sup> *Hudson v. Plets*, 11 Paige, 180.

<sup>5</sup> *Dawson v. Paver*, 5 Hare, 415.

<sup>4</sup> *In re Perry*, 30 Wis., 268. See

<sup>6</sup> *Coit v. Freed*, 15 Utah, 426, 49 Pac., 533.

the court will not permit the general terms of the writ to be controlled or restricted by reference to the particular nature of the grievance.<sup>7</sup> Nor will the court permit defendants to evade responsibility for violating an injunction by doing through subterfuge that which, while not in terms a violation, yet produces the same effect by accomplishing substantially that which they were enjoined from doing.<sup>8</sup> And where obedience to a writ of injunction requires active effort upon the part of the defendant, a half hearted attempt to comply with the order of the court will not satisfy the requirements of the writ, and in such case the failure of the defendant to make a fair and honest endeavor to render obedience constitutes a violation of the injunction.<sup>9</sup> And when the order is a continuing one, being in the nature of a mandatory injunction commanding the performance of certain acts, its violation may be punished as a contempt.<sup>10</sup>

§ 1434. **Injunctions against proceedings at law.** Where an injunction has been granted to stay proceedings in an action at law, the mere delivery of a declaration has been deemed a

<sup>7</sup> Attorney - General *v.* Great Northern R. Co., 4 DeGex & Sm., 75.

<sup>8</sup> *Gibbs v. Morgan*, 39 N. J. Eq., 79; *Ex parte Miller*, 129 Ala., 130, 30 So., 611, 87 Am. St. Rep., 49. In this case defendant had been enjoined from prosecuting an action of ejectment. An order for an injunction had been entered upon the filing of a bond. After the entry of this order but before the filing of the bond and consequently before the injunction became operative, he procured judgment in the ejectment suit. After the injunctive had been made operative upon the defendant by the filing of a bond and after it had been served upon him, he took out execution

under the judgment and ousted the complainant thereunder. When charged with a violation of the injunction, defendant contended that he had not disobeyed the terms of the order since it ran against the prosecution of the action of ejectment. The court held that since the ultimate object of the injunction was to prevent complainant from being ousted, defendant had violated the injunction in spirit, although there was no disobedience to its express terms.

<sup>9</sup> *Kentucky Heating Co. v. Louisville Gas Co.*, 109 Ky., 428, 59 S. W., 490.

<sup>10</sup> *State v. Baldwin*, 57 Iowa, 266, 10 N. W., 645.

violation of the writ.<sup>11</sup> And the service of a trial notice in the action enjoined,<sup>12</sup> or obtaining a change of venue,<sup>13</sup> is a breach of the mandate of the court. And when an injunction has been granted to stay proceedings after judgment, the taking out of execution upon the judgment is a contempt of court.<sup>14</sup> So where an injunction has been obtained against execution under a judgment, the taking of any steps toward execution beyond the completion of the judgment is a violation of the injunction.<sup>15</sup> So, too, it has been held to be a violation of an injunction against proceedings at law to place in the hands of the sheriff an attachment for non-payment of costs, even though the costs in question were actually taxed before the writ was allowed.<sup>16</sup> And where, before the issuing of an injunction against proceedings at law, legal process had been placed in the hands of the sheriff, and the plaintiff in the action at law did not stop the process on being applied to by the sheriff for further instructions, his neglect to countermand the writ was held to be a contempt.<sup>17</sup> But in an early English case, where an injunction was had to restrain proceedings after judgment, with leave to proceed to judgment, it was held that the taking out of a *scire facias* after judgment, in order to an inquiry of assets, was not a violation of the injunction, since the plaintiff should be allowed to proceed so far that he might be at liberty, *eo instanti*, upon the dissolution of the injunction, to take out execution.<sup>18</sup> And an injunction against the prosecution of an action at law is not violated by issuing an execution for costs due in such action, the collection of which has not been enjoined.<sup>19</sup>

<sup>11</sup> *Mills v. Cobby*, 1 Meriv., 3.

<sup>16</sup> *Partington v. Booth*, 3 Meriv.,

<sup>12</sup> *Clark v. Wood*, 2 Halst. Ch., 148.  
<sup>458</sup>; *Bird v. Brancker*, 2 Sim. & St., 186.

<sup>17</sup> *Woodley v. Boddington*, 9 Sim., 214.

<sup>13</sup> *Pariente v. Bensusan*, 13 Sim., 522.

<sup>18</sup> *Morrice v. Hankey*, 3 P. Wms., 146.

<sup>14</sup> *Hereford v. Carpenter, Toth.*, 113.

<sup>19</sup> *German Savings Bank v. Habel*, 80 N. Y., 273.

<sup>15</sup> *Bullen v. Ovey*, 16 Ves., 141.

But the dismissal of one of several actions which have been enjoined and the subsequent bringing of another suit for the same demand will be treated as a violation of the injunction and as a contempt of court.<sup>20</sup>

§ 1435. **Agents; stranger to cause; aiding another a violation; procuring violation by another.** While it would seem that the agents of one against whom an injunction is awarded, having knowledge of the order may be held liable for acts committed in violation of its terms,<sup>21</sup> yet one who was not a party to the proceedings, and who has acquired no rights from any of the parties *pendente lite*, is not guilty of a breach of the injunction by exercising a right which belonged to him before the suit.<sup>22</sup> So a stranger to the cause, who is unconnected with the parties defendant, will not be punished for doing the act prohibited by the injunction.<sup>23</sup> But a breach amounting to a contempt may be committed, even by aiding one who acts in an official capacity and under authority of law. Thus, where an injunction is granted to quiet possession, defendant who assists a justice of the peace in making restitution upon a forcible entry thereby commits a breach.<sup>24</sup> And a party who is enjoined from doing an act violates the injunction by procuring another to do the prohibited act. Thus, where defendant is enjoined from selling an article under a certain infringing label, it is a violation of the injunction to turn over the entire stock of the article to a third person for the purpose of enabling him to do the forbidden act.<sup>25</sup>

§ 1436. **Assignee of chose in action; suit by trustees; dissolution in part.** The assignee of a *chose in action*, who, after the dissolution of an injunction against himself, institutes proceedings at law relative to the matter concerning which he was

<sup>20</sup> *In re Schwarz*, 14 Fed., 787.

<sup>23</sup> *Boyd v. State*, 19 Neb., 128, 26

<sup>21</sup> *Wellesley v. Mornington*, 11 N. W., 925.

Beav., 181.

<sup>24</sup> *Woodward v. Earl of Lincoln*,

<sup>22</sup> *Bootle v. Stanley*, 2 Eq. Ca. 3 Swanst., 626.

Ab., 528.

<sup>25</sup> *Société Anonyme v. Western Distilling Co.*, 42 Fed., 96.

enjoined, is not guilty of a violation of the injunction, although it has not been dissolved as against his assignor.<sup>26</sup> Nor is the institution of an action at law by trustees to recover possession of trust property a breach of an injunction which has been granted to prevent their selling such property, since the assertion of the legal title by the trustees may be necessary for the protection of the rights of all parties in interest.<sup>27</sup> But where three plaintiffs at law have been enjoined from proceeding with an action, and a dissolution is afterward allowed as against two of the plaintiffs, it is held to be a violation for the three afterward to proceed with the action; although if the injunction has been dissolved generally, and not merely as against the two, it is not a violation if the two should carry on the proceedings in the name of the three.<sup>28</sup>

§ 1437. **Breach need not be committed in person.** To render one liable for a violation of an injunction, it is not necessary that he should have actually committed the breach in person, and one who is present, aiding and abetting in the commission of the act, or who permits it to be done in his presence, and without remonstrance, is himself guilty of an actual breach of the injunction, and will be punished accordingly.<sup>29</sup> Thus, an attaching creditor who has been restrained from selling the property attached, violates the writ if he allows the attaching officer to sell in his presence without remonstrance, the officer being regarded as his agent for the purposes of the sale.<sup>30</sup> And one who quietly stands by and permits an injunction to be violated is guilty of a contempt, no matter how unreasonable the provisions of the writ may have been.<sup>31</sup> If, however, complainant, at whose instance an injunction has been granted, himself

<sup>26</sup> *Imperial Gas Light Co. v. Myl. & Cr.*, 497; *Blood v. Martin*, 21 Ga., 127; *Phillips v. City of Detroit*, 2 Flippin, 92.

<sup>27</sup> *Nichols v. Campbell*, 10 Grat., 560.

<sup>30</sup> *Blood v. Martin*, 21 Ga., 127.

<sup>28</sup> *Money v. Jordan*, 13 Beav., 229.

<sup>31</sup> *Stimpson v. Putnam*, 41 Vt., 238.

<sup>29</sup> *St. John's College v. Carter*, 4



consents to its violation he is estopped from afterward having defendant punished for such violation.<sup>32</sup>

§ 1438. **Permitting violation by others a contempt.** It is the clear duty of one who is enjoined from the commission of a particular act not only to refrain from doing the act in person, but also to restrain his employees from doing the thing forbidden, and a mere passive and personal obedience to the order will not suffice. And when, by his own negligence and inattention, one who has been enjoined permits his agents, partners and employees to do the prohibited act, he may be punished for contempt in disregarding the injunction.<sup>33</sup> And where defendant, against whom an injunction has been issued, negligently fails to take the proper steps to insure obedience to the writ upon the part of his employees, he may be held guilty of a violation of the injunction.<sup>34</sup>

§ 1439. **Disobedience under other authority not allowed.** Defendants who are enjoined from doing a particular act will not be permitted under authority from another tribunal or body to do the act in question, pending such injunction, and will be guilty of a contempt of court if they thus violate the injunction, it being their clear duty to obey it until it is dissolved by the same authority by which it was granted.<sup>35</sup>

§ 1440. **Obligation of injunction usually limited to parties named.** The obligations of an injunction will not usually be extended to persons who are not named in the writ, and they will not be liable for a breach of a mandate which is not directed to them.<sup>36</sup> Thus, where the writ is simply directed to a de-

<sup>32</sup> Howard v. Durand, 36 Ga., 346. 181; Buhlman v. Humphrey, 86

<sup>33</sup> Poertner v. Russell, 33 Wis., 193. Iowa, 597, 53 N. W., 318, distinguishing Silvers v. Traverse, 82

<sup>34</sup> Westinghouse A. B. Co. v. Christensen E. Co., 121 Fed., 562. Iowa, 52, 47 N. W., 888, 11 L. R. A., 804; Newcomer v. Tucker, 89

<sup>35</sup> Muller v. Henry, 5 Sawy., 465. Iowa, 486, 56 N. W., 499. But in See also Williamson v. Carnan, 1 Silvers v. Traverse, 82 Iowa, 52, 47 Gill & J., 184. N. W., 888, 11 L. R. A., 804, it

<sup>36</sup> Iveson v. Harris, 7 Ves., 256; was held, under Code Section 1543, Wellesley v. Mornington, 11 Beav., which provides that "any person

fendant, without including his agents or servants, an agent will not be punished for a breach.<sup>37</sup> Nor will a person be punished for contempt because of the violation of an injunction by his servants, he himself being free from all blame in person. But defendant may, in such case, be held liable for the costs of the proceedings to commit for the breach.<sup>38</sup> And where defendant's attorney has been enjoined from proceeding at law, it has been held a breach of the injunction for the defendant himself to proceed.<sup>39</sup>

§ 1440 *a*. **When persons not parties guilty of contempt; agents, servants and employees; aiders and abettors; grantee of defendant.** Upon the other hand, where the injunction runs against the defendants, their agents and servants, or against those who are associated with them or are aiding and abetting them, all persons who are included in the description contained in the injunction, although not parties to the suit or named in the bill, will be held to a strict observance of the writ, and if, with full knowledge of the terms of the injunction, they violate the order themselves or assist or encourage others in so doing, they may be punished for contempt of court.<sup>40</sup> Thus, where an injunction is issued against a defendant, his servants, agents and employees, the latter, upon being served with a copy of the

violating the terms of any injunction" to abate a nuisance existing in any place kept for the unlawful sale of intoxicating liquors, shall be punished for contempt, that the lessee of such premises, taking them after the granting of an injunction, which ran against defendant and all persons using the premises for such purposes, and using them contrary to the prohibition of the writ, was guilty of contempt, although he was not a party to the suit in which the injunction was granted and it was not shown that

he had any knowledge of the injunction proceeding.

<sup>37</sup> *Wellesley v. Mornington*, 11 Beav., 181.

<sup>38</sup> *Rantzen v. Rothschild*, 14 W. R., 96.

<sup>39</sup> *Sedgwick v. Redman, Cary*, 44.

<sup>40</sup> *Bessette v. Conkey Co.*, 194 U. S., 324, 24 Sup. Ct. Rep., 665; *Daly v. Amberg*, 126 N. Y., 490, 27 N. E., 1038; *Fowler v. Beckman*, 66 N. H., 424, 30 Atl., 1117; *Smith-Barry v. Dawson*, 27 L. R. Ir., 558; *State v. Knight*, 3 S. Dak., 509, 54 N. W., 412, 44 Am. St. Rep., 809; cases cited under § 1415 *l*.

injunction, are bound thereby, although there has been no service of process or of the injunction upon the defendant himself, and they may accordingly be punished for a violation of the order.<sup>41</sup> So where the injunction runs against the defendants, their aiders and abettors, a person, who, although not a party to the suit, but having knowledge of the injunction, assists in its violation is guilty of contempt.<sup>42</sup> So also an injunction granted against the defendant, his agents and attorneys, is binding upon agents of the defendant who have knowledge of the order and they may accordingly be held guilty of contempt for doing the act enjoined.<sup>43</sup> So an injunction which runs against a defendant, his agents and employees, is binding upon his attorney who was present in court when the order was granted and he may be held responsible for its violation. Nor can he justify his conduct upon the ground that he was afterward retained by and acting for other parties in doing the act in question.<sup>44</sup> So where the injunction is granted against defendant, his grantees and successors, restraining the diversion of water, a subsequent grantee of defendant's interest in the water is bound by the injunction and may be punished for its violation.<sup>45</sup> But where the writ restrains a person and his agents or servants, his tenants are not regarded as included within the prohibition.<sup>46</sup>

§ 1440 *b*. **The same; distinction between criminal and remedial proceedings for contempt.** The doctrine has been carried even further; and it has been held, where an injunction ran against the defendant and his agents and servants, that one,

<sup>41</sup> *Daly v. Amberg*, 126 N. Y., 407, 56 Pac., 93, 77 Am. St. Rep., 490, 27 N. E., 1038.

<sup>42</sup> *Fowler v. Beckman*, 66 N. H., 424, 30 Atl., 1117. <sup>46</sup> *Hodson v. Coppard*, 29 Beav., 4.

<sup>43</sup> *State v. Knight*, 3 S. Dak., 509, 54 N. W., 412, 44 Am. St. Rep., 809. As to the liability of a landlord of premises for violation of an injunction restraining their use for saloon purposes, see *Koester v. State*, 36 Kan., 27, 12 Pac., 339.

<sup>44</sup> *Wimpy v. Phinizy*, 68 Ga., 188.

<sup>45</sup> *Ahlers v. Thomas*, 24 Nev., 339.

although not a party to the suit or named in the writ and although not included in the designation of agents or servants, may be held amenable to the order of the court and may be punished for contempt where he knowingly aids and assists in setting the injunction at naught.<sup>47</sup> But it is to be observed that where it is sought to hold one who is not a party to the suit or named in the writ liable for disregarding an injunction, the punishment is imposed not upon the theory that the person thus charged is in any way bound by the injunction itself or that he is guilty of a technical violation of the writ, but solely for the purpose of protecting and upholding the power and dignity of the court as against one who, although not bound by the injunction as a party to the suit, has knowingly and willfully defied the authority of the court in setting its order at naught. In such case the proceeding is criminal in its nature and is without regard to any injury which may be inflicted upon the defendant as the result of the violation of the writ, and it is to be distinguished from a contempt proceeding against a party to a suit for a violation of the injunction, which is remedial in its character and is ordinarily brought for the purpose of affording redress and compensation to the plaintiff for the injury resulting from the violation of the writ.<sup>48</sup> Where, therefore, a contempt proceeding is brought against a person upon the theory that he is technically bound by the injunction as a party to the suit, it is improper to impose punishment for a violation of the injunction, where it appears that he was not a party to the injunction action, either by name or representation, or in any way bound by the decree.<sup>49</sup> But it is not to be understood that a court may not in the proper case inflict punishment upon

<sup>47</sup> *Seaward v. Paterson*, (1897) 1 Ch., 545.

<sup>48</sup> *Seaward v. Paterson*, (1897) 1 Ch., 545; *Bessette v. Conkey Co.*, 194 U. S., 324, 24 Sup. Ct. Rep., 665; *In re Christensen Engineering Co.*, 194 U. S., 458, 24 Sup.

Ct. Rep., 729; *People v. Diedrich*, 141 Ill., 665, 30 N. E., 1038; *Enoch Morgan's Sons Co. v. Gibson*, 59 C. A., 46, 122 Fed., 420.

<sup>49</sup> *In re Reese*, 47 C. C. A., 87, 107 Fed., 942.

one who is a party to the suit, and as such bound by the injunction, in a proceeding which is purely criminal in its nature and which is brought for the sole purpose of vindicating the power and authority of the court.<sup>50</sup>

§ 1441. **Violation by attorney.** When an attorney is enjoined from further proceedings in an action begun by him for the appointment of a receiver, and the injunction is served upon him while he is actually engaged in making his application for a receiver before the court in which such cause is pending, and when informed of the injunction the attorney states to the court that he is enjoined from further proceedings, and then delivers to the court his motion papers with a draft order for the appointment of the receiver, he is guilty of a plain contempt of court.<sup>51</sup> And where persons having a right of action in either the state or the United States courts elect to bring their action in the former, and are there enjoined from further proceedings until certain assets are marshaled, it is a contempt of court to bring their action in the United States courts, pending such injunction, and the attorneys may be punished for thus violating the mandate of the state court.<sup>52</sup>

§ 1442. **Constructing railroad in violation of injunction.** Where an injunction is granted against a railway company, its agents and any one acting under its authority or in its behalf, restraining it from constructing its road through a particular farm, and the president of the company afterward becomes a party to the suit upon his own motion, and the road is constructed through the land in question with his approval and under his order and direction, he will be liable in a proceeding for contempt for its violation, although not personally named in the writ.<sup>53</sup>

<sup>50</sup> *In re Christensen Engineering Co.*, 194 U. S., 458, 24 Sup. Ct. Rep., 729.

<sup>51</sup> *In re South Side R. Co.*, 10 Bank. Reg., 274.

<sup>52</sup> *Hines v. Rawson*, 40 Ga., 356.

<sup>53</sup> *State v. Cutler*, 13 Kan., 131.

§ 1443. **Injunctions against corporations, municipal and private.** Since an injunction granted against a corporation is binding upon all persons acting for or in behalf of the corporation who are apprised of the writ, it follows that all members of the corporation upon whom service is had are liable for a breach of the injunction. And the passage of a resolution by the common council of a city, granting a right which they are forbidden by injunction to grant, is a violation of the writ, although the terms of the resolution are not accepted by the person to whom the right is granted.<sup>54</sup> So the chief engineer of a steamboat, owned by a foreign corporation and running between two ports of different states, is liable for the violation of an injunction restraining the use of certain machinery upon the boat; and it is no excuse for him to say, he being a defendant in the injunction suit, that he was a mere agent of the corporation.<sup>55</sup> And an injunction against a corporation and its agents binds its officers as well; nor can the president of the corporation, by resigning his office and selling his shares of stock, be permitted to do the act which has been enjoined.<sup>56</sup> So when the trustees of a society or corporation are restrained from doing a particular thing, and afterward resign, and their successors are elected and, with full knowledge of the injunction, such successors do the act in question, they are guilty of contempt and will be punished accordingly.<sup>57</sup> So where a mandatory injunction ran against a railroad company, its officers, agents, servants and employees, restraining them from refusing to afford to plaintiff, another railroad company, all reasonable and proper facilities for the interchange of traffic with it, an engineer of the defendant road, who was not a party to the injunction suit but who had knowledge of the granting of the writ, was held guilty of contempt of court for deserting his engine and refusing to haul

<sup>54</sup> *People v. Sturtevant*, 9 N. Y., 263.

<sup>55</sup> *Sickles v. Borden*, 4 Blatch., 14.

<sup>56</sup> *Morton v. Superior Court*, 65 Cal., 496.

<sup>57</sup> *Avery v. Andrews*, 51 L. J. R. N. S. Ch., 414.

freight which was destined for delivery at points along plaintiff's line.<sup>58</sup> And where an injunction was granted against a corporation restraining it from selling certain infringing devices, a person who owned a controlling interest in the corporation and who had furnished counsel at his own expense and had borne the costs and expenses of the suit and who had, with knowledge of the existence of the injunction, caused the infringing devices to be sold contrary to the terms of the writ, was held guilty of contempt of court notwithstanding the fact that he was not a party to the proceeding.<sup>59</sup> But when a corporation is enjoined, its officers, who have themselves done nothing toward violating the injunction and who have taken all reasonable steps in their power to prevent its violation, will not be held responsible for the acts of other parties in disregard of the injunction.<sup>60</sup> And an injunction against a corporation and its officers is binding upon the latter only while they remain officers and act in that capacity, and where an officer presents his resignation which is duly accepted, his subsequent acts done in furtherance of his own private interests can not be construed as a violation of the injunction against the corporation.<sup>61</sup> And a municipal corporation as such can not be held guilty of contempt in violating an injunction, but only the persons or officers who have disobeyed the writ.<sup>62</sup>

<sup>58</sup> *In re Lennon*, 166 U. S., 548, 17 Sup. Ct. Rep., 658, 41 L. Ed., 1110, affirming *Ex parte Lennon*, 12 C. C. A., 134, 64 Fed., 320; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed., 746, 19 L. R. A., 395.

<sup>59</sup> *Stahl v. Ertel*, 62 Fed., 920.

<sup>60</sup> *Trimmer v. Pennsylvania, S. & N. E. R. Co.*, 36 N. J. Eq., 411.

<sup>61</sup> *Mexican Ore Co. v. Mexican G. M. Co.*, 47 Fed., 351. In this case an injunction had been granted against a corporation and its officers restraining them from disposing of certain property. After-

ward one of the officers of the company resigned and his resignation was duly accepted, whereupon he levied upon the property in question under a judgment obtained by him against the corporation upon a *bona fide* claim due him from the corporation and had the property sold in satisfaction of the judgment. He was held to be not guilty of contempt of court in so doing.

<sup>62</sup> *Bass v. City of Shakopee*, 27 Minn., 250, 4 N. W., 619, 6 N. W., 776.

§ 1444. **Defective service no excuse; misnomer of defendant; idem sonans.** A defect in the service of the writ affords no excuse for its violation, and one may be guilty of contempt in disobeying an injunction, notwithstanding defective service by the officer to whom it was entrusted. It is sufficient for the court to know that the person enjoined had actual knowledge of its order.<sup>63</sup> And an officer who, with due notice of an injunction against the sale of certain property under execution, nevertheless proceeds with the sale, becomes a trespasser *ab initio*, even though the property may have been levied upon before the injunction was granted.<sup>64</sup> And the fact that the name of the defendant has been incorrectly given in the restraining order is no defense where the person attached is the person who was intended to be enjoined and is the one who has been guilty of a violation of the injunction.<sup>65</sup> And especially will the misnomer of the defendant constitute no defense where the names are *idem sonans*.<sup>66</sup>

§ 1445. **Right of way.** Nothing will be deemed a violation of an injunction forbidding the disturbance of a particular right of way, which does not interfere with the free exercise of the right or easement. Thus, where there are several distinct but intimately connected rights, such as a right of way and a right of soil, an injunction having been granted for the preservation of one of them, a fair exercise of the other right will not be deemed a violation of the writ as to the first, if it leaves as large a scope for its exercise as before.<sup>67</sup>

§ 1446. **Spirit of injunction to be regarded.** In deciding whether there has been an actual breach of an injunction it is important to observe the objects for which the relief was granted, as well as the circumstances attending it.<sup>68</sup> And it is

<sup>63</sup> Mead v. Norris, 21 Wis., 310.

<sup>66</sup> Peck v. Conner, 82 Iowa, 725,

<sup>64</sup> Turner v. Gatewood, 8 B. Mon., 613.

47 N. W., 977.

<sup>65</sup> Dickerson v. Armstrong, 94

<sup>67</sup> Bosley v. Susquehanna Canal, 3 Bland, 63.

Fed., 864.

<sup>68</sup> Loder v. Arnold, 15 Jur., 117; Campbell v. Tarbell, 55 Vt., 455.



to be observed that the violation of the spirit of an injunction, even though its strict letter may not have been disregarded, is a breach of the mandate of the court. Thus, where an injunction has been granted restraining a defendant and his servants and agents from obstructing and impeding the passage of canal boats, the bringing of fifteen actions of trespass against the canal company on account of the passage of that number of barges along that part of the canal flowing over the land in controversy, is a violation of the spirit of the injunction, and will be restrained.<sup>69</sup> Upon the other hand, when the conduct complained of, although literally a breach of the injunction, is not so in spirit, and when defendants have acted in good faith, and there is no evidence of any intention on their part to violate the writ, they will not be held guilty of a contempt of court.<sup>70</sup>

§ 1447. **Injunction not retroactive.** An injunction is not retroactive in effect, and a person who has been enjoined will not be held liable for contempt for the doing of any act before suit brought or injunction granted.<sup>71</sup> And where a railway company was enjoined from taking up or removing or disposing of the iron forming its track, but before the granting of the injunction or the institution of the cause the company had sold the iron to third persons, the omission of the company to prevent such purchasers from removing the iron was held not to constitute a violation of the injunction.<sup>72</sup> So where the writ was granted in a mandatory form, commanding defendants to deposit certain bonds with the state treasurer, and enjoining them from delivering the bonds or putting them in circulation, but before defendants were served with process in the action the bonds had been removed to a bank in another state where they still were, and it was impossible for defendants to obtain

<sup>69</sup> *Grand Junction Canal Co. v. 12 Ab. Pr.*, 171; *Witter v. Lyon*, 17 *Sim.*, 38. 34 *Wis.*, 564.

<sup>70</sup> *Fraas v. Barlement*, 10 *C. E.* <sup>72</sup> *People v. Albany & V. R. Co.*, 12 *Ab. Pr.*, 171.

<sup>71</sup> *People v. Albany & V. R. Co.*,

possession of them so as to comply with the mandate of the court, it was held that defendants were properly discharged from proceedings in attachment for the alleged contempt.<sup>73</sup> But where a defendant is enjoined from disposing of certain property, it is not a sufficient excuse upon proceedings against him for contempt in violating the injunction that he delivered the property in pursuance of a sale made before the injunction was allowed.<sup>74</sup> Where, however, part of the injury complained of has already been done by defendant before the injunction issues, but after the writ is allowed he does acts in furtherance of such injury, he can not protect himself from the consequences of a violation by the fact that the injunction did not in terms prohibit the act which he committed, and he will, accordingly, be held guilty of a contempt.<sup>75</sup>

§ 1448. **Purchase of patented article; distribution of circulars for sale of infringing article.** Where an injunction had been obtained against the use of a patented article, and plaintiffs, desiring to know whether defendant was still using the article in violation of the injunction, procured another person to apply to defendant for the purchase of one of the manufactured articles, in an action brought by defendant in the injunction suit for a conspiracy to procure him to violate the injunction and to subject him to costs and damages, it was held that the patentees might rightfully resort to that method of determining whether the injunction was being violated.<sup>76</sup> And a defendant, who has been enjoined from selling certain articles as

<sup>73</sup> Witter v. Lyon, 34 Wis., 564.

<sup>74</sup> Jewett v. Bowman, 12 C. E. Green, 171. See also *In re Perry*, 30 Wis., 263.

<sup>75</sup> Thropp v. Field, 10 C. E. Green, 166. But where the Supreme Court of the state had awarded a peremptory writ of *mandamus*, and an injunction was afterward obtained in an inferior court restraining the enforcement

of the judgment in the *mandamus* proceeding upon grounds alleged to have arisen after the rendition of such judgment, the Supreme Court refused to punish such proceedings as a contempt of court. *Villavas v. Walker*, 24 La. An., 213.

<sup>76</sup> Knowles v. Peck, 42 Conn., 386.

an infringement upon plaintiffs' patent, violates the injunction by selling beyond the territorial jurisdiction of the court, whether the articles are or are not sent within its jurisdiction.<sup>77</sup> But an injunction against the infringement of a patent is not violated by the distribution of circulars advertising the infringing article for sale.<sup>78</sup>

<sup>77</sup> *Macaulay v. White S. M. Co.*,  
9 Fed., 698.

<sup>78</sup> *Dowagiac Mfg. Co. v. Minnesota M. P. Co.*, 124 Fed., 736.

## III. REMEDY FOR VIOLATION.

- § 1449. Attachment for contempt; governing considerations; violation not considered in collateral suit.
1450. Plaintiff's conduct; laches; acquiescence.
1451. Delay in obtaining service.
1452. Practice in proving violation.
1453. Removal of cause to United States courts.
1454. Procedure in United States courts.
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1463. Levy of execution; statutory franchise.
1464. Party in contempt not allowed hearing on motion to dissolve.
1465. Patent right; costs.
1466. Appeal and writ of error in judgments for contempt.

§ 1449. **Attachment for contempt; governing considerations; violation not considered in collateral suit.** The usual remedy for breach of injunction is by proceedings against the offending party for an attachment for contempt of court.<sup>1</sup> And

<sup>1</sup> *Monroe v. Harkness*, 1 Cranch C. C., 157; *Monroe v. Bradley*, *ib.*, 158. The remedy by attachment was adopted by the English Court of Chancery at an early day for the punishment of violations of injunctions. A curious and instructive case is *Allen v. Dingley*, *Choyce Cases* in Chancery, 113, reported as follows: "Forasmuch as Mr. Dr. Yale, one of the masters of this court, to whom the consideration of a contempt in the breach of an injunction was committed by Master Sergeant Powtrel was referred, hath made report that the said Sergeant Powtrel after the open publishing of the same injunction, and after perfect knowledge thereof, did move at the King's Bench Barre for judgment for the defendant, iterating his motion for the same, which he did after the sight of the said injunction. Therefore, the said Mr. Sergeant Powtrel being this present day called into this court is openly enjoined in the sum of one hundred pounds, not to depart out of the Town until he shall be

in taking steps to punish such contempt the court will not inquire into the merits of the cause in which the writ was issued, the only question for determination being whether the mandate of the court has been violated.<sup>2</sup> And where the court renders a judgment finding defendant guilty of contempt, it has no power to make the enforcement of the judgment conditional upon the pleasure of the court.<sup>3</sup> An order of commitment for breach of an injunction being *strictissimi juris*, it will not be granted except upon a clear and satisfactory showing of an actual violation.<sup>4</sup> The proceedings are *quasi* criminal in their nature, and may, it would seem, be brought in behalf of the people,<sup>5</sup> although not necessarily conducted by counsel for the government.<sup>6</sup> Indeed it has been held to be the better practice to institute an independent action in the name of the state, although it is not error to entitle the proceedings in the civil case.<sup>7</sup> And owing to the criminal nature of the proceedings, the accused can not be compelled to testify against himself as to the commission of the

licensed thereunto by the Right Honorable the Lord Keeper of the Great Seal of England. Allen plaintiff, Dingley defendant. Anno 19 Eliz. The like order was made the same term against Master Robert Snagg for moving for the defendant in the King's Bench in the same cause." And see, *ante*, § 1415 *m*.

<sup>2</sup> *People v. Spalding*, 2 Paige, 326; *Kentucky Heating Co. v. Louisville Gas Co.*, 109 Ky., 428, 59 S. W., 490. See also *Rogers Manufacturing Co. v. Rogers*, 38 Conn., 121.

<sup>3</sup> *State v. Voss*, 80 Iowa, 467, 45 N. W., 898, 8 L. R. A., 767.

<sup>4</sup> *Mann v. Stephens*, 15 Sim., 377; *Grand Junction Canal Co. v. Dimes*, 17 Sim., 38; *Worcester v. Truman*, 1 McLean, 483.

<sup>5</sup> *Worcester v. Truman*, 1 Mc-

Lean, 483; *Crook v. The People*, 16 Ill., 534, and cases cited; *Freeman v. City of Huron*, 8 S. Dak., 435, 66 N. W., 928; *People v. Diedrich*, 141 Ill., 665, 30 N. E., 1038; *Alderson v. Commissioners*, 32 West Va., 640, 9 S. E., 868, 5 L. R. A., 334, 25 Am. St. Rep., 840. In *Steelsmith v. Fisher Oil Co.*, 47 West Va., 391, 35 S. E., 15, it was held to be the proper practice, upon a motion to dissolve a preliminary injunction, to hear a petition for a rule to show cause in a contempt proceeding.

<sup>6</sup> *Worcester v. Truman*, 1 McLean, 483; *Crook v. The People*, 16 Ill., 534, and cases cited; *Freeman v. City of Huron*, 8 S. Dak., 435, 66 N. W., 928.

<sup>7</sup> *Freeman v. City of Huron*, 8 S. Dak., 435, 66 N. W., 928.

offense.<sup>8</sup> But although contempt proceedings are thus *quasi* criminal, the accused is not entitled to a trial by jury, nor is his constitutional right thereby impaired.<sup>9</sup> And a person applying to a court of equity for the punishment of a party guilty of a breach of injunction must show that he has some interest in the subject-matter of the controversy which gave rise to the injunction.<sup>10</sup> But although the violation of an injunction is a contempt of the court by which it was granted, a court of law can not take cognizance of such violation in another action, nor will such violation be allowed to operate in a collateral proceeding as a forfeiture of legal rights when it is not shown that it has been perpetuated by a final decree.<sup>11</sup>

§ 1450. **Plaintiff's conduct; laches; acquiescence.** The conduct of the party obtaining the injunction, as well as the motive of defendant in violating it, may properly be taken into account in determining defendant's liability for the breach.<sup>12</sup> And where an injunction is granted before 'proceedings at law, staying all proceedings, and defendant in the injunction suit afterward institutes an action in ejectment, to which complainant pleads, and suffers two months to elapse before taking any steps toward punishing the breach, the court will refuse to punish for contempt.<sup>13</sup> So where the facts upon which the proceedings for contempt are based were known to the plaintiff for more than four years before the proceedings were instituted, the attachment

<sup>8</sup> *Ex parte* Gould, 99 Cal., 360, 33 Pac., 1112, 21 L. R. A., 751, 37 Am. St. Rep., 57.

<sup>9</sup> *State v. Markuson*, 5 N. Dak., 147, 64 N. W., 934; *State v. Markuson*, 7 N. Dak., 155, 73 N. W., 82; *State v. Murphy*, 71 Vt., 127, 41 Atl., 1037; *State v. Fredlock*, 52 West Va., 232, 43 S. E., 153, 94 Am. St. Rep., 932.

<sup>10</sup> *Hawley v. Bennett*, 4 Paige, 163; *Secor v. Singleton*, 35 Fed., 376.

<sup>11</sup> *Callan v. McDaniel*, 72 Ala., 96.

<sup>12</sup> *Mills v. Cobby*, 1 Meriv., 3; *Barfield v. Nicholson*, 2 L. J. Ch., 90. As to the liability of a plaintiff who has procured an injunction to preserve the *status quo* as to the property in controversy, for disregarding his own injunction by doing the acts which defendant is enjoined from doing, see *Varizandt v. Argentine M. Co.*, 2 McCrary, 642.

<sup>13</sup> *Mills v. Cobby*, 1 Meriv., 3.

will be refused.<sup>14</sup> And where the person obtaining the writ misrepresents the action of the court to the public, and defendant, in endeavoring to correct such misrepresentation, commits a technical violation of the injunction, proceedings against him for contempt by the complainant will not be entertained.<sup>15</sup> But to deprive a party obtaining the writ of the right to move for a committal for its breach, on the ground of his acquiescence therein, a strong showing of acquiescence must be made out.<sup>16</sup> Thus, where a defendant seeks to evade his liability for breach of an injunction restraining him from the use of complainant's trade mark, upon the ground of acquiescence, he must show such a degree of acquiescence as would suffice to create a new right in himself.<sup>17</sup>

§ 1451. **Delay in obtaining service.** While, as we have already seen, the doctrine is well established, that to render a defendant liable for violating an injunction it is only necessary that he should have been in any manner apprised of its existence, although not actually served with the writ,<sup>18</sup> yet complainant's laches in obtaining service may be taken into account upon a motion to commit for a breach. Thus, where complainant has suffered a period of four months to elapse, after the granting of the order, before getting it drawn up and served, although

<sup>14</sup> *Matheson v. Hanna*, 122 Fed., 836.

<sup>15</sup> *Barfield v. Nicholson*, 2 L. J. Ch., 90.

<sup>16</sup> *Rodgers v. Nowill*, 3 DeGex, M. & G., 614; *Kempson v. Kempson*, 61 N. J. Eq., 303, 48 Atl., 244, modified and affirmed in 63 N. J. Eq., 783, 52 Atl., 360, 625.

<sup>17</sup> *Rodgers v. Nowill*, 3 DeGex, M. & G., 614. The degree of acquiescence required to justify defendant is stated by Lord Justice Turner, as follows: "Then on the question of acquiescence, I think that in a case of this description,

where there has been an injunction granted by this court, there must, in order to deprive the party who has obtained the injunction of the right to move for committal upon the breach of it, be a case made out almost amounting to such a license to the party enjoined to do the act enjoined against, as would entitle him to maintain a bill against others for doing that act. The party enjoined must, I think, show such acquiescence as would be sufficient to create a new right in him."

<sup>18</sup> See § 1422, *ante*.

defendant may be in contempt, having been present in court on the hearing of the motion for the injunction, yet a motion to commit under such circumstances will be refused with costs.<sup>19</sup>

§ 1452. **Practice in proving violation.** In proceedings for contempt for the violation of an injunction, the usual method of proving the fact of violation is by affidavit.<sup>20</sup> It is not necessary that the matter alleged as the foundation for the charge of contempt should appear in the rule to show cause why defendant should not be attached, the rule to show cause serving merely as a process.<sup>21</sup> But it is usually requisite that service of the writ of injunction should be shown, since without such service

<sup>19</sup> *James v. Downes*, 18 Ves., 522. "A party can not," observes Lord Eldon, "be committed for the breach of an injunction, that express species of contempt, unless there is an injunction. On the other hand, if he were present when the order was made, the court will not permit him to elude its justice by doing that, before the injunction is sealed, which, if it was actually sealed, would be a contempt; but there is no instance, previous to the case of *Hearn v. Tennant* (14 Ves., 136), that the court ventured to consider the act of contempt, unless the party, being present in court, heard the order for an injunction made. My opinion on that occasion was, and still is, that if the party was in court while the motion was proceeding, he should not, by turning his back before the court pronounced the order 'let the injunction go,' escape the process, considering it a mere contrivance; but the court can never intend that the plaintiff, having obtained the order granting the injunction, is to lie by four months as if it had not been

granted. The court, interposing to assist the plaintiff and prevent his losing the benefit of the process, while he is actually pursuing it, can not consider him entitled under the order for three or four months together. Therefore dismiss this motion with costs." But see *United Telephone Co. v. Dale*, 25 Ch. D., 778.

<sup>20</sup> *State v. Myers*, 44 Iowa, 580. In Kansas, under the constitution and laws of the state, an injunction may be granted by a judge at chambers, and a proceeding for contempt for its violation may also be had at chambers. And when such proceeding is heard by the judge at chambers and no jury is asked for and no objection is taken to the hearing without a jury, it will not be held error on review by the supreme court. And the proceeding for contempt being a summary one, it may be heard upon the original affidavit filed in the proceeding, and without formal pleadings. *State v. Cutler*, 13 Kan., 131.

<sup>21</sup> *Columbia Water Power Co. v. Columbia*, 4 S. C., 388.



or notice of the injunction there can be no violation, and the attachment proceedings may be dismissed or an attachment refused for want of such proof.<sup>22</sup> If, however, defendant is thus discharged from the attachment for want of affidavit of service of the injunction, such discharge does not operate as a hearing upon the merits, and constitutes no bar to a subsequent attachment for the same alleged contempt.<sup>23</sup> And the breach of an injunction being in the nature of a tort, it constitutes no valid objection to proceedings for a committal that plaintiff has moved against but one of the defendants.<sup>24</sup> And where it is sought to defend against contempt proceedings upon the ground that the court which granted the injunction was without jurisdiction of the subject-matter and that the injunction was consequently void, all of the allegations of fact contained in the bill and in the moving papers upon the application for the injunction must be taken as true.<sup>25</sup>

§ 1453. **Removal of cause to United States courts.** Under the former statute of the United States concerning the removal of causes from the state to the federal courts, it was held that the latter could not punish for the violation of an injunction which had been granted in the cause by the state court before removal, since the removal operated *ipso facto* as a dissolution of the injunction.<sup>26</sup> But since, under the removal act of March 3, 1875, it is expressly provided that any injunction granted before the removal, against a defendant applying for such removal, shall continue in force until modified or dissolved by the United States court,<sup>27</sup> no reason is perceived why the latter tribunal should not punish for a violation of the injunction committed after the removal into that forum.

<sup>22</sup> State v. Gilpin, 1 Del. Ch., 25;  
Whipple v. Hutchinson, 4 Blatch.,  
190.

<sup>26</sup> McLeod v. Duncan, 5 McLean,  
343.

<sup>23</sup> State v. Gilpin, 1 Del. Ch., 25.

<sup>24</sup> Newman v. Ring, 10 Jur., 463.

<sup>25</sup> People v. Van Buren, 136 N.  
Y., 252, 32 N. E., 775, 20 L. R. A.,  
446.

<sup>27</sup> U. S. Revised Statutes, § 629,  
sec. 4; 1 U. S. Comp. Stat. 1901,  
p. 511; U. S. Revised Statutes, §  
646; 1 U. S. Comp. Stat. 1901, p.  
523.

§ 1454. **Procedure in United States courts.** The proper method of procedure for the punishment of a breach of injunction, in the courts of the United States, is by motion that the defendant stand committed for the violation, and he must be served with due notice of this motion. The object of the proceeding is the enforcement of obedience to the mandates of the court by punishing any intentional violation of its process. The mode of relief being summary and rigorous, he who invokes the aid of equity for the punishment of a violation of injunction is required to show the allowance of the writ upon the conditions imposed by the court, that it has been duly served, and that defendant has been notified of the time and place of the motion.<sup>28</sup>

§ 1455. **Proofs in attachment proceedings.** It is incumbent upon complainant, in moving an attachment against a defendant for contempt of court in disobeying an injunction, to state in the proofs upon which the application is founded the specific acts of omission, or of commission, which constitute the alleged contempt.<sup>29</sup> And in proceedings for contempt proofs are properly admissible to contradict the answer of the defendant to the inter-

<sup>28</sup> *Worcester v. Truman*, 1 McLean, 483. The nature of the proceedings for the punishment of a violation of injunction, and the conditions requisite to the exercise of this summary jurisdiction of courts of equity in enforcing obedience to their mandates, are well laid down by McLean, J., in this case, as follows: "This, although in the nature of a criminal proceeding, is not, in fact, strictly of that character. It is instituted and carried on by the counsel for the plaintiff, and not necessarily by the attorney for the government. The object of the proceeding is to enforce obedience to the process of the court by punishing an intentional disregard of it. The

mode is summary and rigorous, and the party who thus invokes the aid of the court should bring himself strictly within the rule which entitles him to the redress sought, and subjects the defendant to the punishment which must follow. He must show the allowance of the injunction, that it has been issued on the terms specified and within the limits imposed, that it has been duly served, and that notice has been given to the defendant of the time and place of the motion, 'that he stand committed for a breach of the injunction.'"

<sup>29</sup> *Parkhurst v. Kinsman*, 2 Blatch., 76.

rogatories propounded to him.<sup>30</sup> And it is competent for a defendant charged with a breach, as in the case of an injunction against the infringement of a patent, to show his compliance with the writ while it remained in force, and that it carried on its face the period of its duration, which having expired, he could not be guilty of a breach.<sup>31</sup>

§ 1456. **Mitigating circumstances.** If a defendant, who has been guilty of a contempt of court in violating its injunction, voluntarily and promptly submits himself to the jurisdiction of the court upon proceedings in attachment, and frankly and fully answers all interrogatories propounded to him in such proceedings, while such conduct can not excuse or justify the contempt, it would seem to be proper to consider it as a mitigating circumstance in fixing the punishment.<sup>32</sup> And where defendants, upon a rule to show cause why they should not be attached for contempt, disclaim all intention of violating the injunction, and plaintiffs only seek a determination of the court as to the duty of defendants, rather than a punishment for contempt, it is proper to discharge the rule to show cause.<sup>33</sup>

§ 1457. **Extent of fine imposed; fine payable to plaintiff.** Where a defendant, against whom proceedings are had by attachment for violating an injunction, shows that he did not know the nature of the process and that he ceased to do the act enjoined as soon as he could take the advice of counsel, it was regarded as sufficient punishment to require him to pay the costs of the motions for the injunction and for its dissolution, and of the motion for an attachment.<sup>34</sup> So where defendant has violated an injunction, but acting under competent advice and with no intention of disobeying the order of the court, it is proper to require him to pay the costs of the attachment proceedings, without imposing any fine.<sup>35</sup> And it is a proper punishment

<sup>30</sup> *Crook v. The People*, 16 Ill., 534.

<sup>31</sup> *Daw v. Eley*, L. R. 3 Eq., 496.

<sup>32</sup> *State v. Eddy*, 2 Del. Ch., 269.

<sup>33</sup> *Longwood V. R. Co. v. Baker*, 12 C. E. Green, 166.

<sup>34</sup> *Bradford v. Peckham*, 9 R. I., 250.

<sup>35</sup> *Carstaedt v. U. S. Corset Co.*, 13 Blatch., 371.

to require a party who has violated an injunction to pay the actual damages which have been sustained by the plaintiff by reason of such violation, with the costs of the proceedings for contempt.<sup>36</sup> But where there had been a clear and wilful violation of the injunction, it was held proper to punish by a fine of the amount of the taxed costs and solicitor's and counsel fees incurred by defendant's resistance to the proceedings for attachment and in the proceedings for the taking of testimony as to violation, the defendant to stand committed until payment of such fine.<sup>37</sup> And it is held under the New York Code<sup>38</sup> that where a judgment creditor of an insolvent obtains an injunction restraining another judgment creditor from proceeding under his judgment to sell certain chattels which are more than enough to satisfy plaintiff's judgment, it is proper for the court to impose a fine for the violation of the injunction equal to the amount of plaintiff's judgment.<sup>39</sup> But in Connecticut it has been held improper to divide the fine imposed between the injured party and the state, although the petitioner injured by the violation should be allowed the costs and expenses of his proceedings in attachment.<sup>40</sup> In the federal courts, however, the rule is well established that, in imposing a fine for the violation of an injunction, the court may direct the payment of the money or of a portion thereof to the aggrieved party as compensation for the time and expense involved in procuring the punishment for contempt.<sup>41</sup>

§ 1458. **Appellate court averse to interfering with punishment.** The court granting the injunction is necessarily

<sup>36</sup> *Chapel v. Hull*, 60 Mich., 167, 26 N. W., 874.

<sup>37</sup> *Doubleday v. Sherman*, 8 Blatch., 45. And in *Stahl v. Ertel*, 62 Fed., 920, the court, in imposing a fine, allowed a reasonable solicitor's fee as part of complainant's costs.

<sup>38</sup> § 2284 of the Code.

<sup>39</sup> *People v. Van Buren*, 136 N.

Y., 252, 32 N. E., 775, 20 L. R. A., 446.

<sup>40</sup> *Rogers Manufacturing Co. v. Rogers*, 38 Conn., 121.

<sup>41</sup> *Macaulay v. White S. M. Co.*, 9 Fed., 698; *In re Tift*, 11 Fed., 463, 18 Bank. Reg., 78; *Wells v. Oregon R. & N. Co.*, 19 Fed., 20; *In re Bloomfield G. M. Co.*, 19 Fed., 20; *Cary Mfg. Co. v. Acme Flex-*

invested with large discretion in enforcing obedience to its mandate, and upon proceedings by attachment for its violation the extent of the fine and imprisonment to be inflicted as a punishment for the contempt rests in the judgment of the court itself. And courts of appellate powers are exceedingly averse to interfering with the exercise of such judgment and discretion, and will not, ordinarily, revise the action of the inferior court in such matters.<sup>42</sup>

§ 1459. **Evidence on hearing.** In proceedings in attachment for contempt of court in violating an injunction, general evidence as to the damage sustained by petitioner from the violation in question is admissible to show its character, although evidence of other acts of contempt than those charged is ordinarily inadmissible. And in such proceedings it is not permissible to show that the allegations of the bill upon which the injunction was granted are not true, since if untrue the proper course is to apply to the court to modify or dissolve the injunction. A defendant who is enjoined will not, therefore, be permitted to violate the mandate of the court, and then to attempt to excuse his disobedience by showing that the injunction was unfounded. While the injunction should always be plain and specific, since a defendant can not be entrapped into a contempt of court by vague and general orders, yet where he is enjoined from interfering with certain trade marks, which are particularly described in the bill, such description will be deemed sufficient upon proceedings against him for contempt.<sup>43</sup>

§ 1460. **Corporation may be punished.** A court of equity has jurisdiction to punish a corporation as well as a private person for contempt in violating an injunction.<sup>44</sup> And where

ible Clasp Co., 48 C. C. A., 118, 108 v. Gammell, 56 Ga., 98; State v. Fed., 873; Westinghouse A. B. Co. Knight, 3 S. Dak., 509, 54 N. W., v. Christensen E. Co., 121 Fed., 412, 44 Am. St. Rep., 809. 562; Paxton v. Brinton, 126 Fed., 43 Rogers Manufacturing Co. v. 542. Rogers, 38 Conn., 121.

<sup>42</sup> Rogers Manufacturing Co. v. Rogers, 38 Conn., 121; Williams v. Lampkin, 53 Ga., 200; Thweatt <sup>44</sup> Mayor v. New York & S. I. F. Co., 64 N. Y., 622; People v. Albany & V. R. Co., 12 Ab. Pr., 171;

there has been a gross contempt of court in the violation of an injunction by a board of municipal officers, a sequestration has been awarded as a punishment for the offense, when there was property upon which the sequestration could operate.<sup>45</sup> And each separate violation constitutes a separate contempt which may be punished by attachment.<sup>46</sup>

§ 1461. **Attachment not the only punishment; imprisonment.** While an attachment for contempt is the usual and accustomed remedy for the violation of an injunction, the court is not necessarily confined to the process of attachment alone. And where, pending an interlocutory injunction and before the final hearing, a defendant violates the mandate of the court by taking possession of the lands in controversy, it is competent for the court upon final hearing to direct that possession be restored as it was when the bill was filed; and this may be done, even though the injunction is refused upon the final hearing.<sup>47</sup> And when defendants are enjoined from selling personal property, but they proceed to sell some of the property in violation of the injunction, the court may, as a punishment for the contempt, require them to pay into court the money received, or to restore the property, and in default thereof to be committed for contempt.<sup>48</sup> And where a court imposes a fine for the violation of an injunction, it is proper to direct that the defendant stand committed until the fine is paid, and such a judgment is not subject to the charge of uncertainty.<sup>49</sup> And where it is within the power of a defendant who has been adjudged guilty of contempt to cease disobeying the order of the court, it is proper to direct that he be imprisoned until he shall comply with the decree of the court.<sup>50</sup> But while the

Golden Gate C. H. M. Co. v. Superior Court, 65 Cal., 187, 3 Pac., 628.

<sup>45</sup> Spokes v. Banbury Board of Health, L. R. 1 Eq., 42.

<sup>46</sup> Golden Gate C. H. M. Co. v. Superior Court, 65 Cal., 187, 3 Pac., 628.

<sup>47</sup> Byne v. Byne, 54 Ga., 257.

<sup>48</sup> Thweatt v. Gammell, 56 Ga., 98.

<sup>49</sup> Shore v. The People, 26 Col., 516, 59 Pac., 49.

<sup>50</sup> Elliot v. Whitmore, 10 Utah, 246, 37 Pac., 461.

court has the power in a proper case to commit the offending party until the damages resulting to the plaintiff from a violation of the injunction have been paid, yet this should not be done where the damages are unliquidated and not ascertainable except by the intervention of a jury, and the defendant is amply able to respond in damages.<sup>51</sup> And it is not proper by an order of attachment for contempt to require defendants to deliver up possession of property, when such delivery was not required by the terms of the injunction, and when it is not shown that defendants possessed themselves of the property in question subsequent to the injunction, or in violation of its terms.<sup>52</sup>

§ 1462. **Impropriety of injunction considered in fixing punishment; proceedings after dissolution.** We have already seen that the fact of an injunction having been erroneously granted in the first instance affords no justification or excuse for its violation.<sup>53</sup> It may, however, affect the question of punishment, and may be taken into consideration by the court in determining whether a defendant shall be attached for contempt. And it has been held that after the dissolution of an injunction erroneously or improperly granted, an attachment for its violation will not lie.<sup>54</sup> But where proceedings are instituted in behalf of the people for contempt in the violation of an injunction, they may, if begun before, be prosecuted after the injunction is dissolved.<sup>55</sup> But the hearing of a rule for contempt for violation of an injunction followed by a dismissal of the rule is an adjudication that the defendant was not guilty, and constitutes a defense to a subsequent rule based upon the same alleged violation.<sup>56</sup>

<sup>51</sup> *Thompson v. Penn. R. Co.*, 48 444; *Richards v. West*, 2 Green N. J. Eq., 105, 21 Atl., 182. Ch., 456.

<sup>52</sup> *Columbia Water Power Co. v. Columbia*, 4 S. C., 388. <sup>54</sup> *Moat v. Holbein*, 2 Edw. Ch., 188.

<sup>53</sup> *Moat v. Holbein*, 2 Edw. Ch., 188; *People v. Sturtevant*, 9 N. Y., 534. <sup>55</sup> *Crook v. The People*, 16 Ill., 263; *Sullivan v. Judah*, 4 Paige,

<sup>56</sup> *Wilson v. Craige*, 113 N. C., 463, 18 S. E., 715.

§ 1463. **Levy of execution; statutory franchise.** The proper remedy against a plaintiff in execution who proceeds with a levy, notwithstanding he has been enjoined from so doing, is by attachment, and not by *supersedeas*.<sup>57</sup> And where an injunction has been issued to prevent the infringement of a statutory franchise, an attachment will issue for contempt in violating the writ.<sup>58</sup>

§ 1464. **Party in contempt not allowed hearing on motion to dissolve.** One who is in contempt for the violation of an injunction will not usually be allowed a hearing upon a motion to dissolve, although if the nature and extent of the punishment to be inflicted depend upon the determination of the question whether the injunction shall be continued, a hearing may be had on the motion to dissolve.<sup>59</sup>

§ 1465. **Patent right; costs.** Upon a motion for an attachment for a breach of an injunction restraining the use of a patent right, affidavits will not be admitted to show that complainant was not the original inventor. The question in such a case is not as to the merits of the writ itself, but whether it has actually been disobeyed. And if it be made to appear that the injunction has really been violated, but defendant is protected from attachment by a defective service of the writ, he will not be allowed costs on refusal of the motion to attach.<sup>60</sup> And when defendant has been found guilty of a contempt in violating an injunction restraining him from the use of a patented invention, but he does not appear to have acted in wilful disregard of the orders of the court, the payment of all profits made or damages occasioned by such use, with the costs of the proceeding, has been held to be a sufficient punishment.<sup>61</sup>

<sup>57</sup> *Commercial Bank v. Wafers*, 10 Sm. & Mar., 559.

<sup>58</sup> *In re Vanderbilt*, 4 Johns. Ch., 57.

<sup>59</sup> *Endicott v. Mathis*, 1 Stockt., 110.

<sup>60</sup> *Whipple v. Hutchinson*, 4 Blatch., 190.

<sup>61</sup> *Ready Roofing Co. v. Taylor*, 15 Blatch., 94.



§ 1466. **Appeal and writ of error in judgments for contempt.** The question whether an order, adjudging defendant guilty of contempt for the violation of an injunction, is reviewable by appeal or by writ of error, depends for its solution upon the nature and purpose of the proceeding in which the judgment has been rendered, bearing in mind the fundamental distinction between the two kinds of contempt before referred to.<sup>62</sup> And where the proceeding is civil or remedial, being instituted for the purpose of making compensation to the plaintiff for the injury resulting from the violation of the injunction, the judgment partakes of the nature of any other interlocutory order which may be entered in the cause, and it is therefore reviewable, at the instance of either party, by appeal either from the order itself, where the statute permits appeals from interlocutory orders, or by appeal from final decree.<sup>63</sup> Upon the other hand, if the proceeding is of a criminal nature, being brought for the purpose, not of affording redress to the injured party, but of inflicting punishment for an offense committed against the authority and dignity of the court, then the judgment, as in other criminal cases, is reviewable by writ of error and not by appeal.<sup>64</sup> And the test usually adopted to determine whether the proceeding is criminal or civil is whether or not the fine which is ordered to be paid goes to the state or to the injured party.<sup>65</sup>

<sup>62</sup> § 1440 b, *ante*.

<sup>63</sup> *In re Christensen Engineering Co.*, 194 U. S., 458, 24 Sup. Ct. Rep., 729; *People v. Diedrich*, 141 Ill., 665, 30 N. E., 1038; *Enoch Morgan's Sons Co. v. Gibson*, 59 C. C. A., 46, 122 Fed., 420; *Laramie National Bank v. Steinhoff*, 7 Wyo., 464, 53 Pac., 299.

<sup>64</sup> *In re Christensen Engineering Co.*, 194 U. S., 458, 24 Sup. Ct. Rep., 729; *Gould v. Sessions*,

14 C. C. A., 366, 67 Fed., 163; *Alderson v. Commissioners*, 32 West Va., 640, 9 S. E., 868, 5 L. R. A., 334, 25 Am. St. Rep., 840; *In re Murphey*, 39 Wis., 286; *Town of Williamstown v. Darge*, 71 Wis., 643, 38 N. W., 187. See *Shannon v. State of Wisconsin*, 18 Wis., 604.

<sup>65</sup> *In re Christensen Engineering Co.*, 194 U. S., 458, 24 Sup. Ct. Rep., 729; *Gould v. Sessions*, 14 C. C. A., 366, 67 Fed., 163.

## CHAPTER XXX.

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§ 1467. **The general doctrine stated.** A marked feature of interlocutory injunctions, as distinguished from those which are final or perpetual, is that the former are liable to be dissolved upon sufficient cause shown at any stage of the proceedings, after the coming in of the answer. And in general it may be said to rest in the sound discretion of the court to dissolve an interlocutory injunction upon the coming in of the answer denying the equities of the bill, or to continue it until a final hearing upon the merits, if such course shall seem best calculated to subserve the ends of justice and to protect the rights of all parties in interest.<sup>1</sup> The dissolution or continuance of an injunction after answer filed being, therefore, largely a matter of judicial discretion, appellate courts are averse to interfering with the exercise of such discretion.<sup>2</sup> And in granting a dissolution the court may, in its discretion, impose such terms as may be necessary to secure substantial justice.<sup>3</sup>

<sup>1</sup> Chetwood v. Brittan, 1 Green 798; McEldowney v. Lowther, 49 Ch., 438; Firmstone v. De Camp, 2 West Va., 348, 38 S. E., 644.

C. E. Green, 309; Attorney-General v. Oakland County Bank, 184; Grannis v. Lorden, 103 Cal., Walk. (Mich.), 90; Shellman v. 472, 37 Pac., 375; Tiede v. Scott, Charlt. R. M., 380; Holt v. Schneidt, 99 Wis., 201, 74 N. W., Bank of Augusta, 9 Ga., 552; Dent 798; McEldowney v. Lowther, 49 v. Summerlin, 12 Ga., 5; Tiede v. West Va., 348, 38 S. E., 644.

Schneidt, 99 Wis., 201, 74 N. W., <sup>3</sup> Cook v. Jenkins, 35 Ga., 113.

§ 1468. **When motion to dissolve entertained.** In some of the states the rule has been broadly laid down that an interlocutory or preliminary injunction may be dissolved at any stage of the cause, either before or after answer filed, or after demurrer to the bill,<sup>4</sup> while in others the doctrine prevails that a motion to dissolve will not be entertained until after the coming in of the answer.<sup>5</sup> But a motion to dissolve will not be entertained pending a general demurrer to the bill, since the motion involves the same questions of equity which must arise upon the demurrer, and is an attempt to obtain, by the summary action of the court, a decision as to the equity of the case, which should be determined upon demurrer.<sup>6</sup> In the case of a bill of discovery, however, which also prays an injunction against a judgment at law, if the bill contains no allegations sufficient to entitle complainant to a discovery, and no ground upon which the injunction can be sustained, a dissolution may be had upon motion, without the answer of the party from whom the discovery is sought.<sup>7</sup> But a motion to dissolve such an injunction for want of equity in the bill will not be allowed before answer filed, when the bill charges that the obligations sued on at law were obtained without consideration and by fraud, and the affidavits annexed to the bill are sufficient to make out a *prima facie* case of fraud.<sup>8</sup>

§ 1469. **Motion to dissolve before answer.** When an injunction has been irregularly obtained, or complainant has not used due diligence in the prosecution of his suit, it may be dissolved before the coming in of the answer.<sup>9</sup> If, however,

<sup>4</sup> Jones v. Commercial Bank, 5 How. (Miss.), 43. And see Min-  
turn v. Seymour, 4 Johns. Ch., 173.

<sup>5</sup> Rentfroe v. Dickinson, 1 Overt.,  
196; Taylor v. Morgan, 2 Mart.  
O. S., 77.

<sup>6</sup> Ransom v. Shuler, 8 Ired. Eq.,  
304.

<sup>7</sup> Zoll v. Campbell, 3 West Va.,  
226.

<sup>8</sup> Shotwell's Admr'x v. Smith, 5  
C. E. Green, 79.

<sup>9</sup> Depeyster v. Graves, 2 Johns.  
Ch., 148; Woodhull v. Neafie, 1  
Green Ch., 409, and note; Corey v.  
Voorhies, Ib., 5; West v. Smith,  
Ib., 309; Receivers v. Biddle, 3  
Green Ch., 222. But see, *contra*,  
Taylor v. Morgan, 2 Mart. O. S.,  
77.

plaintiff's delay or laches, which is urged as a ground for dissolution, was caused through mistake and inadvertence, and no evidence of wilful procrastination appears, the injunction will not be dissolved.<sup>10</sup> But a motion to dissolve will be entertained, notwithstanding complainant has amended his bill and no answer has yet been filed to the bill as amended.<sup>11</sup> And where upon its face the bill is wanting in equity to sustain the injunction, it may be dissolved on motion without answer.<sup>12</sup> Or, if an injunction has been granted contrary to the provisions of an imperative statute, the defendant is entitled to summary relief, and the order will be set aside for irregularity, without putting him to his motion to dissolve.<sup>13</sup> If, however, the motion is interposed before answer, it is regarded as in the nature of a demurrer, by which defendant admits the truth of all the allegations relied upon as a foundation for the injunction.<sup>14</sup> Thus, a motion to dissolve the injunction before answer, on the ground of insufficiency in the allegations of the bill, operates as a demurrer and admits the truth of all the facts alleged.<sup>15</sup>

§ 1470. **Burden of proof; effect of answer.** Upon the hearing of a motion to dissolve an injunction the defendant is considered as the actor, and upon him rests the burden of disproving the equities of the bill.<sup>16</sup> Such full and positive proof, however, is not exacted as would be necessary upon a final hearing of the cause, since the effect of requiring such strictness of proof might be to prevent a dissolution until the final hear-

<sup>10</sup> Schermehorn v. L'Espenasse, 2 Dall., 360.

<sup>11</sup> Semmes v. Mayor, 19 Ga., 471.

<sup>12</sup> Kneedler v. Lane, 3 Grant's Cases, 523.

<sup>13</sup> Marlatt v. Perrine, 2 C. E. Green, 49. And see, as to the distinction between discharging an injunction for irregularity and dissolving it for want of equity, Judah v. Chiles, 3 J. J. Marsh., 302.

<sup>14</sup> Titus v. Mabey, 25 Ill., 232;

Hickey v. Stone, 60 Ill., 458; Bennett v. McFadden, 61 Ill., 334; Jenkins v. Felton, 9 Rob. (La.), 200; Ludington v. Tiffany, 6 West Va., 11. And see Schwarz v. Sears, Harring. (Mich.), 440.

<sup>15</sup> Jenkins v. Felton, 9 Rob. (La.), 200; Ludington v. Tiffany, 6 West Va., 11.

<sup>16</sup> Miller v. Washburn, 3 Ired. Eq., 161; Ingles v. Straus, 91 Va., 209, 21 S. E., 490.

ing.<sup>17</sup> And while, for the purposes of such motion, defendant's answer is to be taken as true in so far as it is responsive to the allegations of the bill,<sup>18</sup> yet it should fully and fairly meet complainant's equities, without evasion and without passing over material allegations. Even then, if a reasonable doubt exists in the mind of the court as to whether the equity of the bill is sufficiently answered, the injunction will not be dissolved, but will be continued to the hearing.<sup>19</sup> And upon a motion to dissolve the answer is taken as evidence only of such facts as are responsive to the bill.<sup>20</sup>

§ 1471. **Effect of failure to answer allegations.** Upon a motion to dissolve upon bill and answer, such allegations of the bill as are not denied by the answer are to be taken as true, since they stand upon the affidavit of complainant, and are entitled to as much weight upon the motion to dissolve as upon the original motion for the injunction.<sup>21</sup> It follows, therefore, that everything is to be presumed against the defendant with respect to any matter as to which he might have answered fully and directly, but has not done so.<sup>22</sup> And so long as any material allegations of the bill remain unanswered, or if the answer does not fully meet the case disclosed by the bill, the injunction will not be dissolved, but will be continued until the final hearing of the cause.<sup>23</sup>

§ 1472. **Answer must be responsive; new affirmative matter not considered.** To warrant a dissolution upon bill and answer, the answer should deny the material allegations of the bill with

<sup>17</sup> North's Ex'r v. Perrow, 4 87; Cronise v. Clark, 4 Md. Ch., Rand., 1; Ingles v. Straus, 91 Va., 403; Randolph v. Randolph, 6 209, 21 S. E., 490.

<sup>18</sup> Brewer v. Day, 8 C. E. Green, Green Ch., 182; Yale v. Moore, 3 418, Tenn. Ch., 76. And see Parks v.

<sup>19</sup> North's Ex'r v. Perrow, 4 Spurgin, 3 Ired. Eq., 153.

<sup>20</sup> Robinson v. Cathcart, 2 153.

<sup>21</sup> Cranch C. C., 590. And see Rembert v. Brown, 17 Ala., 667.

<sup>22</sup> Brown v. Stewart, 1 Md. Ch., 76.

<sup>23</sup> Brown v. Stewart, 1 Md. Ch., 87; Yale v. Moore, 3 Tenn. Ch., 76.

the same clearness and certainty with which they are charged.<sup>24</sup> And for the purposes of such a motion, the answer is considered only in so far as it is responsive to the allegations of the bill on which the writ issued.<sup>25</sup> New matter, therefore, not responsive to any allegations of the bill, will not be considered on the hearing of such a motion.<sup>26</sup> So where the answer contains no denials of any allegations of the bill but sets up new affirmative matter, it is error to dissolve a temporary injunction previously granted.<sup>27</sup> So where the answer sets up new matter as an affirmative defense and where the denials of the answer are mere conclusions, such answer is insufficient to justify the dissolution of a temporary injunction.<sup>28</sup> And where the answer does not reply clearly and definitely to the allegations of the bill, a temporary injunction should not be dissolved upon the coming in of the answer.<sup>29</sup> But if the answer so far denies the material allegations of the bill as to leave it without equity, even as to facts which it does not deny, the injunction will be dissolved.<sup>30</sup>

§ 1473. **Vagueness of writ; want of equity; failure to answer; scandal and impertinence.** Where an injunction is so vague and indefinite in its terms as not to apprise defendants of the premises touching which they are enjoined, a dissolution should be allowed.<sup>31</sup> But where the bill shows on its face sufficient cause for granting the injunction, it is error to dissolve it on motion for want of equity.<sup>32</sup> So a motion to dissolve, if

<sup>24</sup> *Buckner v. Bierne*, 9 Sm. & v. Philpot, 27 Ga., 585. And see, Mar., 304.

<sup>25</sup> *Rembert v. Brown*, 17 Ala., 667; *Mabel M. Co. v. Pearson C. & I. Co.*, 121 Ala., 567, 25 So., 754.

And see *Robinson v. Cathcart*, 2 Cranch C. C., 590.

<sup>26</sup> *Wooten v. Smith*, 27 Ga., 216; *Armstrong v. Potts*, 8 C. E. Green, 92; *Vreeland v. New Jersey Stone Co.*, 10 C. E. Green, 140; *Johnston v. Corey*, *Ib.*, 311; *Mabel M. Co. v. Pearson, C. & I. Co.*, 121 Ala., 567, 25 So., 754. And see *Lawrence*

*v. Philpot*, 27 Ga., 585. And see, *post*, § 1481.

<sup>27</sup> *Hendricks v. Hughes*, 117 Ala., 591, 23 So., 637.

<sup>28</sup> *Mobile & M. Ry. Co. v. Alabama M. Ry. Co.*, 123 Ala., 145, 26 So., 324.

<sup>29</sup> *Cartwright v. Bamberger*, 90 Ala., 405, 8 So., 264.

<sup>30</sup> *Moore v. Barclay*, 23 Ala., 739; *Rogers v. Bradford*, 29 Ala., 474.

<sup>31</sup> *Avery v. Onillon*, 10 La. An., 127.

<sup>32</sup> *Floyd v. Turner*, 23 Tex., 292.

based upon the want of equity in the bill, will be disallowed when the bill presents a case for equitable relief, although defectively stated; since the injunction being only intended to preserve the *status quo*, the want of equity ought to be palpable to warrant a dissolution upon such motion.<sup>33</sup> And if defendant declines answering, he is to be regarded on the motion to dissolve as admitting the material allegations of the bill, and it is therefore error to dissolve the injunction, sufficient cause for its retention appearing upon the bill itself.<sup>34</sup> If, however, the whole equity of the bill be denied by the answer, it is no sufficient objection to the motion to dissolve that defendant has incorporated scandalous and impertinent matter into his answer.<sup>35</sup>

§ 1474. **Misrepresentation or suppression of facts by plaintiff.** The utmost good faith being required of those who invoke the extraordinary remedies of equity, it follows that deception or misrepresentation on the part of the person obtaining the injunction affords strong ground for its dissolution. And when it is apparent upon a motion to dissolve an injunction granted *ex parte* that complainant has misrepresented his case, either by actual misstatement, or by a suppression of facts material to a full understanding of the equities involved, and that upon a correct statement of the facts the writ would not have been granted, such misrepresentation is of itself a sufficient ground for a dissolution.<sup>36</sup> Nor is it a sufficient explanation of complainant's conduct in such a case to say that he had forgotten the facts which were omitted, or that he was not aware of their

<sup>33</sup> Love v. Allison, 2 Tenn. Ch., 111.

<sup>34</sup> Peatross v. McLaughlin, 6 Grat., 64.

<sup>35</sup> Livingston v. Livingston, 4 Paige, 111.

<sup>36</sup> Endicott v. Mathis, 1 Stockt., 110; Brown v. Newall, 2 Myl. & Cr., 558; Sturgeon v. Hooker, 1 DeG. & Sm., 484; Dalglish v. Jar-

vie, 2 Mac. & G., 231; Black v. Huggins, 2 Tenn. Ch., 780; Greenhalgh v. Manchester & B. R. Co., 3 Myl. & Cr., 799; Stedman v. Webb, 4 Myl. & Cr., 346. See also Hemphill v. McKenna, 2 Con. & Law., 76; S. C., 3 Dr. & War., 183; S. C., 6 Ir. Eq., 57; Dease v. Plunkett, Drury, 255.



importance.<sup>37</sup> But in order to bring a case within the rule as here laid down, the degree of misrepresentation must have been such as to have influenced the court in granting the writ, by presenting a case different from that which actually existed.<sup>38</sup> And the fact that an injunction granted *ex parte* has been dissolved because of the suppression of material facts in obtaining it constitutes no bar to a future application for another injunction in the same case.<sup>39</sup> But where defendant's answer fully denies the case made by the bill, and plaintiff has misstated his case, he will not be allowed to avail himself of matters alleged in the answer to maintain his injunction, and a dissolution will be allowed.<sup>40</sup> And it would seem that the question as to whether there was a misrepresentation or suppression of important facts in obtaining an injunction will not be considered on an appeal from an order granting or continuing the writ.<sup>41</sup>

§ 1475. **Full and positive denial required in answer.** To entitle a defendant to a dissolution of an injunction, he must deny the entire equity of the bill, directly and without evasion. It will not suffice that he answers the several charges or allegations literally, but he must traverse the substance of each charge, specifically and not merely by a vague and general denial. And where defendant's answer is manifestly evasive and indirect, even though it may be true in substance as alleged, the motion to dissolve will not be allowed.<sup>42</sup> The doctrine as thus stated seems to follow necessarily from the rule, that for the purposes of a motion to dissolve an injunction, any allegation in the bill which is evaded by the answer is to be taken as true in substance.<sup>43</sup> And where defendants answer evasively, alleging an

<sup>37</sup> Clifton v. Robinson, 16 Beav., 355.

<sup>38</sup> Brown v. Newall, 2 Myl. & Cr., 558.

<sup>39</sup> Fitch v. Rochfort, 18 L. J. Ch., 458.

<sup>40</sup> Cresy v. Beavan, 13 Sim., 99.

<sup>41</sup> Bell v. Hull & Selby R. Co., 1 Ra. Ca., 616.

<sup>42</sup> Everly v. Rice, 3 Green Ch., 553; Rich v. Thomas, 4 Jones Eq., 71.

<sup>43</sup> Wilson v. Mace, 2 Jones Eq., 5.

<sup>44</sup> Wilson v. Hendricks, 1 Jones Eq., 295.

improbable version of the transactions out of which complainant's equities have arisen, the court may, in the exercise of a sound discretion, order the injunction continued to the final hearing.<sup>44</sup> Where, however, some of the denials in an answer relied upon for the dissolution of an injunction, although true in themselves, are yet evasive by reason of the manner in which they are made, and are not such as would be sustained on exceptions, yet if other portions of the answer allege facts responsive to the bill, and which, by reason of their being inconsistent with the allegations of the bill, thus deny such allegations, such portions of the answer may be taken in connection with its evasive allegations, and thus constitute a sufficient denial to warrant a dissolution.<sup>45</sup>

§ 1476. **Dismissal of bill operates as a dissolution; dissolution by series of orders; withdrawal of prayer for relief.** Where, as is frequently the case with interlocutory injunctions, the injunction is merely ancillary to the principal relief sought by the bill, the dismissal of the bill of necessity works a dissolution of the injunction *ipso facto*.<sup>46</sup> Upon the bill being dismissed, therefore, the injunction falls, as of course, and without further proceedings.<sup>47</sup> And a preliminary injunction is disposed of by the decision of the court upon the final hearing on the merits denying a permanent injunction.<sup>48</sup> So the filing by a judge of a decision and opinion that a preliminary injunction previously granted ought not to have been allowed and that the bill ought to have been dismissed upon the merits, operates as a dissolution of the injunction, although no formal order of dissolution is actually entered.<sup>49</sup> So when an interlocutory injunction is obtained, but no final hearing is had upon the merits, and an order is afterward entered striking the cause from the

<sup>44</sup> Jones v. Edwards, 4 Jones Eq., 257.

<sup>45</sup> McMahon v. O'Donnell, 5 C. E. Green, 306.

<sup>46</sup> Green v. Pulsford, 2 Beav., 72; Coleman v. Hudson, 5 Blatch., 56.

<sup>47</sup> Green v. Pulsford, 2 Beav., 72.

<sup>48</sup> Christopher & T. S. R. Co. v. Central C. R. Co., 67 Barb., 315.

<sup>49</sup> Coffey v. Gamble, 117 Iowa, 545, 91 N. W., 813.

docket, which order is acquiesced in by plaintiff without any effort to reinstate the cause, the order operates as a virtual dissolution of the injunction.<sup>50</sup> So where the bill for injunction is auxiliary to an action at law, on the dismissal of the proceedings at law the injunction usually shares the same fate.<sup>51</sup> So the dismissal of an action as to a party for or against whom an injunction is granted has the effect of dissolving the injunction as to such person.<sup>52</sup> And although no formal order of dissolution may have been entered, yet where a demurrer is sustained as to all those portions of the bill upon which the injunction is based, and leave is neither asked nor granted to amend the bill, the action of the court in dismissing out of the bill all of the charges upon which the injunction was based is, in substance, a dissolution of the injunction.<sup>53</sup> And an injunction may be dissolved by a series of orders, one dissolving as to a portion of the injunction at one time and another dissolving as to the balance at another time.<sup>54</sup> And where an injunction is sought as merely incidental to the principal relief prayed for, such injunction must of necessity be dissolved when the prayer for such relief is withdrawn.<sup>55</sup> But where a railway company is enjoined from using complainant's land until satisfaction of a judgment obtained against the company for the appropriation of his land, the order for the injunction will not be reversed because of the reversal of the judgment for want of jurisdiction.<sup>56</sup>

§ 1477. **Effect of dissolution upon the main action.** It does not follow, however, that upon the dissolution of an injunction the bill upon which it was granted must be dismissed, since other and further proceedings may be necessary to give the relief sought by the action, and complainant is still entitled to

<sup>50</sup> *Gold v. Johnson*, 59 Ill., 62.

<sup>54</sup> *Brackebush v. Dorsett*, 138

<sup>51</sup> *Phelps v. Foster*, 18 Ill., 309.

Ill., 167, 27 N. E., 934.

<sup>52</sup> *Lyons v. Green*, 68 Ark., 205,

<sup>55</sup> *Wescott v. Mulvane*, 7 C. C.

56 S. W., 1075.

A., 242, 58 Fed., 305.

<sup>53</sup> *Thompson v. McCormick*, 136

<sup>56</sup> *Sturtevant v. Milwaukee R.*

Ill., 135, 26 N. E., 373.

Co., 11 Wis., 63.

continue his cause as an original suit whenever further proceedings are necessary to give him relief.<sup>57</sup> And the injunction being regarded as collateral to the main object of the bill, the suit remains after its dissolution, and no motion to retain it is necessary.<sup>58</sup> It is therefore erroneous to dismiss the bill upon dissolving the injunction, and complainant has a right, if he desires, to proceed to a final hearing of the cause as if no injunction had been prayed or granted.<sup>59</sup> And upon a motion to dissolve a temporary injunction, the propriety of retaining or dissolving the injunction is ordinarily the only issue before the court, and it is therefore erroneous, upon the granting of such a motion, to sustain a demurrer and dismiss the bill in the absence of a motion for that purpose.<sup>60</sup> And while it is proper to dissolve a preliminary injunction upon the answer fully denying all the material facts of the bill upon which the right to the injunction was based, or for want of proper verification of the bill, yet if the bill itself states a case which would, if proven, entitle plaintiff to an injunction or other relief upon the final hearing, it is error to dismiss the bill upon dissolving the injunction, and it should be retained until the final hearing.<sup>61</sup> If, however, the dissolution leaves nothing more to be decided in the injunction suit, it is proper for the court to order the case stricken from the docket, nothing more remaining to be tried in the action.<sup>62</sup> And since a motion to dissolve for

<sup>57</sup> *Blow v. Taylor*, 4 Hen. & M. 159; *Ruffners v. Barrett*, 6 Munf. 207; *Massie v. Mann*, 17 Iowa, 131; *Kelley v. Whitmore*, 41 Tex., 647; *Wilson v. Weber*, 3 Bradw., 125; *Russell v. Wilson*, 37 Iowa, 377.

<sup>58</sup> *Cole v. Sands*, 1 Overt., 183.

<sup>59</sup> *Johnson v. Alexander*, 6 Ark., 302; *Bettison v. Jennings*, 8 Ark., 287; *Love v. Powell*, 67 Tex., 15, 2 S. W., 456; *Walters v. Fredericks*, 11 Iowa, 181; *Russell v. Wilson*, 37 Iowa, 377; *Wilson v. Weber*, 3

Bradw., 125; *Drane v. Winter*, 41 Miss., 517; *Indian R. S. Co. v. E. C. T. Co.*, 28 Fla., 387, 10 So., 480, 29 Am. St. Rep., 258. And see *Hooker v. Austin*, 41 Miss., 717.

<sup>60</sup> *Johnson v. S. B. & L. Assn.*, 132 Ala., 173, 31 So., 496.

<sup>61</sup> *Russell v. Wilson*, 37 Iowa, 377; *Pullen v. Baker*, 41 Tex., 419; *Love v. Powell*, 67 Tex., 15, 2 S. W., 456.

<sup>62</sup> *Wade v. London*, 30 La. An., 660.

want of equity in the bill operates as a demurrer, a decree sustaining such motion and dissolving the injunction is final if no other relief is sought in the case, and an appeal will lie from such decree<sup>63</sup> Or if the plaintiff wishes to stand by his bill upon the sustaining of a motion to dissolve, he may himself ask to have it dismissed and may thereupon appeal from the order of dismissal.<sup>64</sup> And where an injunction is the sole relief sought by the bill, and the court sustains a motion to dissolve heard upon bill, answer and affidavits, it is proper to dismiss the bill instead of retaining it for final hearing upon the pleadings and proofs.<sup>65</sup> And where relief by injunction is the only relief prayed in the bill, and a temporary injunction is dissolved for want of equity upon the face of the bill, such order is in effect a final disposition of the case, and the bill may properly be dismissed for want of equity without requiring defendant to answer.<sup>66</sup> And in such case, where the injunction is dissolved for want of equity apparent upon the face of the bill, the bill should be dismissed even after answer filed.<sup>67</sup> But when the motion is heard upon bill, answer and affidavits, it is error to dismiss the bill upon dissolving the injunction when other relief is sought, and it should be retained to a final hearing.<sup>68</sup> If, however, the motion to dissolve is based upon the fact disclosed in the answer that another court of co-ordinate powers has prior jurisdiction of the subject-matter and of the parties, and this is made to appear to the satisfaction of the court, it is proper to dissolve the injunction and to dismiss the bill at once and without further proceedings.<sup>69</sup> And where a case is heard upon

<sup>63</sup> *Titus v. Mabee*, 25 Ill., 232.

<sup>64</sup> *Williams v. Chicago Exhibition Co.*, 188 Ill., 19, 58 N. E., 611.

<sup>65</sup> *American Live Stock Co. v. Chicago Live Stock Exchange*, 143 Ill., 210, 32 N. E., 274, 36 Am. St. Rep., 385.

<sup>66</sup> *Heinroth v. Kochersperger*, 173 Ill., 205, 50 N. E., 171; *Field v. Village of Western Springs*, 181

Ill., 186, 54 N. E., 929; *Williams v. Chicago Exhibition Co.*, 188 Ill., 19, 58 N. E., 611.

<sup>67</sup> *Goddard v. C. & N. W. R. Co.*, 202 Ill., 362, 66 N. E., 1066.

<sup>68</sup> *Hummert v. Schwab*, 54 Ill., 142; *Noyes v. Vickers*, 39 West Va., 30, 19 S. E., 429.

<sup>69</sup> *Withers v. Denmead*, 22 Md., 135.

bill, answer, replication, motion for injunction and cross-motion to dismiss, the bill is properly dismissed if it shows want of equity upon its face.<sup>70</sup>

§ 1478. **Injunction not perpetuated on refusal to dissolve.** Upon overruling a motion to dissolve, the court will not usually make the injunction perpetual, since the defendant still has a right to be heard upon the merits, and a decree making an injunction perpetual can only be rendered upon a bill *pro confesso*, upon overruling a demurrer to the bill, or upon a hearing on the bill, answer, exhibits and proofs.<sup>71</sup> But after an injunction bill has been taken *pro confesso* for want of an answer, a motion will not be entertained in behalf of defendant for a dissolution of the injunction as having been improperly granted.<sup>72</sup>

§ 1479. **Injunction in aid of specific performance.** Where the writ has been granted merely as auxiliary to the principal relief sought, as in the case of a bill for specific performance of a contract with an injunction in aid thereof, the injunction will be dissolved when the case presented by the bill is such as would not authorize the aid of equity to enforce the contract.<sup>73</sup> And where the bill seeks the specific performance of a contract, and an injunction is granted as auxiliary to this purpose, if it appears that the contract is not concluded or certain in all its parts, so that it can be specifically enforced, the injunction will be dissolved for want of equity in the bill.<sup>74</sup>

<sup>70</sup> Canal Commissioners v. Village of East Peoria, 179 Ill., 214, 53 N. E., 633.

<sup>71</sup> Ottawa v. Walker, 21 Ill., 610; Blundon v. Road Commissioners, 93 Md., 355, 49 Atl., 1. But in Texas it is held that when the court overrules a motion to dissolve upon hearing and argument and the allegations of the bill are not denied in any matter material

to the rights of the parties, and defendants do not demand a jury trial, but give notice of an appeal, it is not error to make the injunction perpetual. Alsup v. Allen, 43 Tex., 598.

<sup>72</sup> Turpin v. Jefferson, 4 Hen. & M., 483.

<sup>73</sup> Geiger v. Green, 4 Gill, 472.

<sup>74</sup> McKibbin v. Brown, 1 McCart., 13.

§ 1480. **Defendant's laches a bar to dissolution.** Delay or laches on the part of a defendant in seeking the aid of the court for the dissolution of an injunction may constitute sufficient ground for refusing the motion. And where there has been long acquiescence under an order for an injunction, the courts are slow to entertain a motion for its dissolution.<sup>75</sup> And although complainant was guilty of a suppression of material facts in obtaining the injunction, yet a delay of several months on the part of defendants, before taking steps for its dissolution, will prevent them from obtaining a dissolution on the ground of the deception used in obtaining the writ.<sup>76</sup>

§ 1481. **Effect of new matter in answer.** The rule is well settled that on a motion to dissolve an injunction defendant will not be permitted to rely upon new matter in his answer in avoidance, but can only rely upon a direct and positive denial of complainant's equities.<sup>77</sup> And no principle of the law of injunctions is better established than that where the equity of the bill is admitted by the answer or is not denied, and the answer sets up new matter in avoidance, or contains matter which amounts to a defense, such answer is not equivalent to a denial of complainant's equities and the injunction will not be dissolved, but will be continued until a hearing of the cause.<sup>78</sup> So a defendant upon a motion to dissolve

<sup>75</sup> Feistel v. King's College, 10 Beav., 491; Bickford v. Skews, 4 Myl. & Cr., 500; Bell v. Hull & Selby R. Co., 1 Ra. Ca., 616; McCoy v. McCoy, 29 West Va., 794, 2 S. E., 809.

<sup>76</sup> Bell v. Hull & Selby R. Co., 1 Ra. Ca., 616.

<sup>77</sup> Salmon v. Clagett, 3 Bland, 125; Bellona Company's Case, Ib., 442; Hendricks v. Hughes, 117 Ala., 591, 23 So., 637; Mobile & M. Ry. Co. v. Alabama M. Ry. Co., 123 Ala., 145, 26 So., 324.

<sup>78</sup> Moss v. Pettingill, 3 Minn.,

217; Green v. Pallas, 1 Beas., 267; The Society v. Low, 2 C. E. Green, 19; Huffman v. Hummer, 2 C. E. Green, 263; McNamara v. Irwin, 2 Dev. & Bat. Eq., 13; Lyrely v. Wheeler, 3 Ired. Eq., 170; Strong v. Menzies, 6 Ired. Eq., 544; Attorney-General v. Oakland County Bank, Walk. (Mich.), 90; Kerns v. Chambers, 3 Ired. Eq., 576; Hutchins v. Hope, 12 Gill & J., 245; Magnet M. Co. v. Page & P. S. M. Co., 9 Nev., 346; Speak v. Ransom, 2 Tenn. Ch., 210; Fargo v. Ames, 45 Iowa, 494; Judd v.

will not be allowed to avail himself of new matter set up in a supplemental answer.<sup>79</sup> Where, however, the answer fully and unequivocally denies all the material allegations of the bill, the fact that it contains new matter, in addition to that in denial, constitutes no bar to a dissolution of the injunction.<sup>80</sup>

§ 1482. **Technical errors; insufficient bond.** Mere technical errors or inaccuracies in matters of form, either in the bill or in the order of the court granting the injunction, will not avail a defendant on a motion to dissolve, provided the bill shows sufficient equity to entitle complainant to the writ.<sup>81</sup> Thus, the omission to ask for the injunction in the prayer for process, it being prayed for in the general prayer of the bill, does not constitute ground for a dissolution, even though it might have been a sufficient objection to warrant the court in refusing the injunction in the first instance.<sup>82</sup> And where a dissolution is sought on account of the insufficiency of the bond, the order of the court dissolving the injunction should not be made absolute in the first instance, but a reasonable time should be allowed for the filing of a new bond, the injunction meanwhile remaining in force.<sup>83</sup> Nor should a dissolution be allowed because of insufficiency of the bond, when it is apparent that plaintiff would be immediately entitled to another injunction upon the same state of facts.<sup>84</sup>

§ 1483. **Abuse of trust.** Where an injunction has been obtained on general allegations in the bill of an abuse of trust, which are denied by the answer, so much of the injunction as

Hatch, 31 Iowa, 491; Huskins v. (Mich.), 490; Louisville & N. R. McElroy, 62 Iowa, 508, 17 N. W., Co. v. City of Bessemer, 108 Ala., 670; Hayes v. Billings, 69 Iowa, 238, 18 So., 880.

387, 28 N. W., 652. But see Society v. Butler, 1 Beas., 498, reversing same case, *Ib.*, 264. <sup>82</sup> Taylor v. Snyder, Walk. (Mich.), 490.

<sup>79</sup> Maryland v. Northern C. R. Co., 18 Md., 193. <sup>83</sup> Beauchamp v. Supervisors, 45 Ill., 274; Gamble v. Campbell, 6 Fla., 347; Smith v. Harrington, 49 Miss., 771.

<sup>80</sup> Shricker v. Field, 9 Iowa, 366. And see, *post*, § 1505, end. <sup>84</sup> Henderson v. Maxwell, 22 La. An., 357.

<sup>81</sup> Beauchamp v. Supervisors, 45 Ill., 274; Taylor v. Snyder, Walk.



restrains defendant from any further exercise of his trust may be dissolved, upon the ground that a general charge of abuse of trust is not sufficient to warrant the interposition of a court of equity; in such cases the specific facts relied upon should be made to appear.<sup>85</sup>

§ 1484. **Matters of record; improper verification.** If all the facts necessary for obtaining an injunction are matters of record, although not properly presented to the court on the application for the writ, and the applicant has an unquestioned right to a new injunction in case the first is dissolved, the motion for a dissolution will not be granted.<sup>86</sup> So although the injunction may have been improvidently or irregularly allowed in the first instance, it will not be dissolved when it is apparent from the record that plaintiff would be entitled to another injunction immediately upon the dissolution.<sup>87</sup> If, however, the allegations constituting the foundation for the relief are improperly sworn to, the injunction may be dissolved, even though the party aggrieved is entitled to a new one upon the dissolution of the first.<sup>88</sup>

§ 1485. **When decree for payment of money equivalent to dissolution.** The same effect which would attend a formal dissolution may sometimes be reached in other ways. Thus, a decree for the payment of money, which had been enjoined in the hands of one who was a party to the action, has the same effect as a dissolution and practically works a dissolution, although no formal order of the court has

<sup>85</sup> *Cooper v. Cooper*, 1 Halst. Ch., 9.      quired by statute. *Speyrer v. Miller*, 108 La., 204, 32 So., 524, 61 L.

<sup>86</sup> *Campbell v. His Creditors*, 8 La., 71.      R. A., 781.

<sup>87</sup> *Dupre v. Swafford*, 25 La. An., 222; *Savoie v. Thibodeaux*, 28 La. An., 169. But this doctrine can not be invoked where it is sought to dissolve the injunction for failure to give a proper bond as required by statute. *Reboul's Heirs v. Behrens*, 5 La., 79; *Catlett v. McDonald*, 13 La., 44. But see *Lewis v. Daniels*, 23 La. An., 170, where it is held that a dissolution will not be allowed because of an informality in the jurat to the affidavit upon

been made dissolving the injunction.<sup>89</sup> So where one has obtained an injunction until answer or further order of the court, he being sole complainant in the bill, and he afterwards amends the bill by joining another person as co-complainant, such an amendment operates as a dissolution.<sup>90</sup>

§ 1486. **Effect of giving security.** The fact of defendant in an injunction suit having given security to perform and abide by the decree of a court of another state, in a suit between the same parties and involving the same subject-matter, will not of itself warrant a dissolution, unless defendant gives security for the payment of the debt which he admits to be due.<sup>91</sup> But where a deposit is made by way of security for costs on obtaining an injunction, as is required in many of the states, the right to the money deposited can not be decided until the final hearing, and defendant is not entitled to it immediately upon a dissolution of the injunction on bill and answer.<sup>92</sup>

§ 1487. **When plaintiff estopped from second injunction.** While, as we have already seen, the jurisdiction of equity for renewing or reviving injunctions improperly dissolved is freely exercised, yet complainant may, by his own acts, be estopped from receiving the aid of a court to restore an injunction upon the grounds on which it was originally granted. Thus, where the dissolution is had without the authority or consent of complainant, but is afterward recognized and acted upon by him, the writ will not be renewed unless upon new and special reasons being shown for the exercise of the jurisdiction, which did not exist when the injunction was originally granted, or when it was dissolved.<sup>93</sup>

which the injunction was granted,  
when the facts disclosed are such  
as to warrant the relief.

<sup>91</sup> McKim v. Fulton, 1 Overt.,  
238.

<sup>89</sup> Crook's Ex'r v. Turpin, 10 B.  
Mon., 243.

<sup>92</sup> Leggett v. Dubois, 1 Paige,

574.

<sup>90</sup> Attorney-General v. Marsh, 16  
Sim., 572.

<sup>93</sup> Livingston v. Gibbons, 5  
Johns. Ch., 250.

§ 1488. **Injunction against illegal tax.** While there is much conflict of authority as to the right of injunction against an illegal or unauthorized tax, yet if the writ has been granted it will be dissolved upon the tax being legalized by legislative authority. And where a perpetual injunction is granted to restrain the payment of a bounty voted by a town meeting to drafted men or their substitutes for the military service, it may be dissolved after the passage by the legislature of an act legalizing the bounty.<sup>94</sup>

§ 1489. **Irregularity in service no ground for dissolution.** Mere irregularities in the service of an injunction constitute no ground for its dissolution, since it is sufficient that defendant is apprised of its existence. Thus, the fact that the writ was served upon defendant beyond the jurisdiction of the court, and in a manner different from the usual and settled practice, is not sufficient reason for a dissolution. And upon a motion to dissolve on the ground of defective service, the sheriff's return is conclusive, and the court will not allow it to be contradicted by affidavit, unless fraud or collusion is shown.<sup>95</sup> Nor will any informality in the service of notice of the motion for a preliminary injunction or of the writ avail defendants upon a motion to dissolve upon the coming in of the answer, since, in conformity with the general principles of pleadings, such informality is waived by the appearance and answer of defendants.<sup>96</sup> Nor will a dissolution be allowed because of defects in the original bill which have been cured by a supplemental bill, which does not change the cause of action and which shows sufficient ground for continuing the injunction.<sup>97</sup> But an irregularity in granting an injunction, consisting in non-compliance with the statute requiring no-

<sup>94</sup> *Bartholomew v. Harwinton*, 33 Conn., 408. *Township of Lodomillo v. District Township of Cass*, 54 Iowa, 115, 6

<sup>95</sup> *Corey v. Voorhies*, 1 Green N. W., 163.

*Ch.*, 5. <sup>97</sup> *Conover v. Ruckman*, 34 N. J.

<sup>96</sup> *Brammer v. Jones*, 3 Fish., Eq., 293.

340; S. C., 2 Bond, 100; District

tice of the application, is not waived by a motion of some of the defendants to dissolve the injunction because irregularly granted; since, although such motion is perhaps unnecessary, it is still proper to move to dissolve because the order was made contrary to the statute.<sup>98</sup>

§ 1490. **Delay in prosecuting suit.** Want of diligence on the part of complainant in prosecuting his cause may, as we have already seen, afford ground for dissolving an injunction. Yet it is to be observed that the rule is applicable only where defendant is so situated that he can not expedite the cause himself. If, therefore, defendant is in such a position that he can proceed, the reason for the rule no longer exists and the rule itself falls: *cessat ratio, cessat ipsa lex*.<sup>99</sup> And when the motion to dissolve is based upon the allegation of a want of equity in the bill, no answer having been filed, if the equity of the bill is abundant and there is a clear necessity for the injunction to protect a clear right of the plaintiff, the injunction should not be dissolved because of delay in prosecuting the suit, unless such delay amounts to gross negligence upon the part of plaintiff.<sup>1</sup>

§ 1491. **Unsettled questions of law.** If the question involved on an application for a dissolution is not a question of fact, but one of law, as, for example, concerning the legal interpretation and construction to be placed upon certain mining rights, which from their nature are such that the answer can not deny the equity of the injunction, so as to bring the case within the established rule to entitle complainant to a dissolution, the motion will be refused, although the injunction may be modified to meet the exigencies of the case.<sup>2</sup> But the party in whose favor an injunction has been granted

<sup>98</sup> Wilkie v. Rochester & S. L. R. Co., 12 Hun, 242.

<sup>1</sup> Scarlett v. Hicks, 13 Fla., 314.

<sup>2</sup> Boston F. Co. v. New Jersey

<sup>99</sup> Schermerhorn v. Merrill, 1 Barb., 511. Zinc Co., 2 Beas., 215.

may at any time withdraw it, and its discontinuance depends entirely upon his pleasure.<sup>3</sup>

§ 1492. **Unsettled disputes; statute of limitations.** When a proper ground for the injunction is admitted by the answer, or sufficient equity is conceded by the answer as a foundation for the writ, and there yet remains an unsettled dispute between the parties, the injunction will not be dissolved, but will be continued until the hearing or further order of the court.<sup>4</sup> Nor is the plea of the statute of limitations, in the answer, sufficient cause to entitle defendant to a dissolution.<sup>5</sup>

§ 1493. **Verification by one of several complainants.** While the verification of an injunction bill by the oath of complainant, or other person cognizant of the facts, is always requisite, yet if there are several complainants, the oath of any one of them will suffice. It follows, therefore, that an injunction will not be dissolved on the ground that one only of several complainants has sworn to the truth of the averments in the bill, since the oath of any one of several joint complainants is sufficient to meet the requirements of the rule.<sup>6</sup>

§ 1494. **Judgment on demurrer.** Where an interlocutory injunction is granted, but the court afterwards sustains a demurrer to the bill and dissolves the injunction, plaintiff refusing to amend and permitting judgment to go against him on demurrer, there is no error in such action of the court; since, the demurrer being sustained, there is nothing left to support the injunction.<sup>7</sup>

§ 1495. **Doctrine of relative convenience; act enjoined already performed.** Upon an application to dissolve an injunction it is proper for the court to balance the relative convenience and inconvenience which would arise from its continu-

<sup>3</sup> *Duckett v. Dalrymple*, 1 Rich. Law, 143.

<sup>4</sup> *Chase v. Manhardt*, 1 Bland, 333.

<sup>5</sup> *Hutchins v. Hope*, 12 Gill & J., 245.

<sup>6</sup> *Hemphill v. Ruckersville Bank*, 3 Ga., 435.

<sup>7</sup> *Clark v. Town of Noblesville*, 44 Ind., 83; *Phillips v. City of Sioux Falls*, 5 S. Dak., 524, 59 N. W., 881.

ance or its dissolution; and if, upon weighing such considerations, the continuance of the injunction is likely to work more mischief than would result from its dissolution, it is proper to grant the motion to dissolve.<sup>8</sup> Nor will an injunction be maintained when it is manifest that its continuance would be useless. Where, therefore, it is shown that the acts, the performance of which it is sought to enjoin, were actually performed before the order for the injunction was made or served, the injunction will be dissolved.<sup>9</sup>

§ 1496. **Failure to give bond or verify bill.** It is not error to dissolve an injunction when plaintiff has failed to comply with the requirement as to the filing of the necessary bond before the issuing of the writ.<sup>10</sup> So when the injunction is granted upon a bill which is not sworn, and without giving the bond required by statute, a dissolution may properly be allowed.<sup>11</sup>

§ 1497. **Dissolution upon giving security.** The practice sometimes prevails of permitting the dissolution of an injunction upon defendant giving bond for the security of plaintiff; and the granting or refusing an application to dissolve upon giving such bond is a matter resting in the sound judicial discretion of the court itself.<sup>12</sup> And where, under the laws of the state, the judge is empowered in his discretion to dissolve an injunction upon the giving of a bond for that purpose, and in the exercise of such discretion he refuses the application, *mandamus* will not lie to compel him to grant the dissolution.<sup>13</sup>

§ 1498. **Indemnity bond; return of property; account; arbitration.** It is within the discretion of a court of equity to substitute an indemnifying bond in lieu of an interlocutory injunction, and it may properly dissolve the injunction

<sup>8</sup> Attorney-General v. Mayor of Liverpool, 1 Myl. & Cr., 171.

<sup>9</sup> Delger v. Johnson, 44 Cal., 182.

<sup>10</sup> Rosenfield v. Gilmore, 32 Tex., 659.

<sup>11</sup> Gaskins v. Peebles, 44 Tex., 390.

<sup>12</sup> State v. Judge of Superior District Court, 29 La. An., 360.

<sup>13</sup> State v. Judge of Eighth District Court, 23 La. An., 766.

upon the giving of such bond by defendants when the ends of justice will be thereby promoted.<sup>14</sup> Where defendant, who was enjoined from disposing of certain property, offered by his answer to return the property to the amount of the indebtedness which he admitted, it was held proper to dissolve the injunction upon defendant making such return and giving a satisfactory bond to abide by and perform the decree of the court.<sup>15</sup> And where an injunction has been granted in aid of an alleged legal right, which is not established at law and is denied by defendants and is open to doubt, and the injunction interferes with the exercise of a *prima facie* legal right on the part of defendants, and is not required to protect plaintiffs against irreparable mischief, it is proper to dissolve the injunction upon condition of defendants keeping an account, when plaintiffs' rights may be as well protected by that course.<sup>16</sup> But, while the courts sometimes impose the performance of certain acts as a condition of dissolving an injunction, an order granting a dissolution unless the parties will submit their controversy to arbitration under the statutes of the state, and will consent to waive an appeal from the judgment of the court below upon such arbitration, is an excess of judicial authority which is wholly inequitable and will not be sustained.<sup>17</sup>

§ 1499. **Injunction against transfer of property pendente lite.** If the object sought by a preliminary injunction is to prevent any transfer or disposition of the property in controversy until a final decree, such injunction serves its whole purpose in being obeyed until the decree; and when, in such case, the final decree disposes of the entire question

<sup>14</sup> Northern Pacific R. Co. v. St. Paul, M. & M. R. Co., 2 McCrary, 260; S. C., 4 Fed., 688. And see New Orleans W. Co. v. Oser, 36 La. An., 918; State v. Debaillon, 37 La. An., 110.

<sup>15</sup> Jewett v. Dringer, 12 C. E. Green, 271.

<sup>16</sup> Shrewsbury & B. R. Co. v. London & N. W. R. Co., 3 Mac. & G., 70.

<sup>17</sup> Sobey v. Thomas, 37 Wis., 568.

and gives the relief prayed by the bill with regard to the disposition of the property in controversy, no order dissolving the interlocutory injunction is necessary to give effect to the final decree.<sup>18</sup>

§ 1500. **Cestui que trust not heard on motion to dissolve.** As regards the parties who are entitled to be heard upon a motion to dissolve, it is held that where the injunction is obtained against trustees the *cestuis que trust* can not be heard if they are not parties to the litigation.<sup>19</sup>

§ 1501. **Dissolution or perpetuation of injunction as res judicata.** The granting of a motion to dissolve is not conclusive upon the right to an injunction, and can not, therefore, be pleaded as *res judicata* upon the right to an injunction at the final hearing. The effect of sustaining such motion is only to determine that, upon the showing then made, plaintiffs were not entitled to an interlocutory injunction, and the order is in no sense a bar to a perpetual injunction upon full proof at the final hearing.<sup>20</sup> If, however, the injunction is made perpetual at the hearing, by the final judgment in the cause, that judgment becomes *res judicata*, and the court can not afterward sustain a motion to dissolve and award damages thereon.<sup>21</sup> But the dissolution of an interlocutory injunction granted by an inferior court, without a dismissal of the bill, constitutes no bar to obtaining relief in a superior court upon the same equities.<sup>22</sup> Where, however, a motion to dissolve a temporary injunction has been overruled, a second motion to dissolve, based upon the same grounds as the former motion, will not be entertained.<sup>23</sup>

§ 1502. **Removal of cause to United States court.** As regards the effect of removing a cause from the state courts

<sup>18</sup> *Musgrave v. Staylor*, 36 Md., 123.

<sup>21</sup> *Bloss v. Tacke*, 59 Mo., 174.

<sup>22</sup> *Roberts v. Jordans*, 3 Munf.,

<sup>19</sup> *Ball v. Tunnard*, 6 Madd. (1st American Edition), 170.

488.

<sup>23</sup> *Hoffman v. Livingston*, 1

<sup>20</sup> *Fisher v. Beard*, 40 Iowa, 625. *Johns. Ch.*, 211.



to those of the United States, upon an injunction already granted by the state tribunal, the construction given to the former acts of Congress governing removals was that the removal operated *ipso facto* as a dissolution of the injunction, and that no motion for a dissolution was necessary.<sup>24</sup> But by the act of Congress now in force it is expressly provided that all injunctions, orders and other proceedings which may be had in the cause prior to its removal, shall continue in force until modified or dissolved by the United States court into which the cause is removed.<sup>25</sup> But when the cause has been removed into the United States court, and a motion is then made to dissolve the injunction upon the same papers upon which it was originally granted in the state court, such motion is regarded as in effect an application for a re-argument of the motion before the state court, and will not be entertained without leave of court being first had to make the application.<sup>26</sup>

§ 1503. **Injunction granted until given day.** The English rule is, that where an injunction is granted until a given day, or until the further order of the court, it is not to be understood as extending beyond the day named, or until further order, but is to cease at an earlier day if the court shall so order; and such an injunction dissolves itself upon the day named, if not continued by the court.<sup>27</sup> In this country, however, it is held that when an interlocutory injunction is granted until a certain day, or until further order, if no order is made upon the day named the injunction does not expire upon that day, but continues until actually dissolved by the court.<sup>28</sup> But

<sup>24</sup> McLeod v. Duncan, 5 McLean, § 646; 1 U. S. Comp. Stat. 1901, 342; Hatch v. Chicago, R. I. & P. p. 523.

R. Co., 6 Blatch., 105; Northwestern Distilling Co. v. Corse, 4 Biss., <sup>26</sup> Carrington v. Florida R. Co., 9 Blatch., 468.

514. But see Carrington v. Florida R. Co., 9 Blatch., 468. <sup>27</sup> Bolton v. London School Board, 7 Ch. D., 766.

<sup>25</sup> U. S. Revised Statutes, § 629, sec. 4; 1 U. S. Comp. Stat. 1901, <sup>28</sup> Bradford v. Peckham, 9 R. I., 250.  
p. 511; U. S. Revised Statutes,

when the injunction is merely ancillary to the principal relief sought and is in terms granted until further order of the court, it is regarded as abrogated by the final judgment of the court granting the principal relief sought by the action and making no provision for continuing the injunction. Nor is this result changed by the fact that defendant has appealed from the final judgment.<sup>29</sup>

§ 1504. **Dissolution unless cause set for hearing.** A court of equity may use its power over an injunction for the purpose of compelling plaintiff to reasonably speed his case, and may order that he set down the cause for hearing, or that the injunction stand dissolved.<sup>30</sup>

§ 1504 *a*. **Dissolution by reversal on appeal.** Where a temporary injunction has been granted and has afterward been made perpetual by final decree, the subsequent reversal of such decree, for reasons which go to the propriety of issuing the injunction, or which deny the sole equity upon which the writ was based, operates as a dissolution of the injunction without the entry by the lower court of any formal order of dissolution.<sup>31</sup>

§ 1504 *b*. **Injunction against infringement; dissolution by expiration of patent pending appeal.** Where an injunction has been granted restraining the infringement of a patent, and, pending an appeal from such injunction, the patent expires, such expiration operates as a dissolution of the injunction and the appeal should be dismissed.<sup>32</sup>

<sup>29</sup> *Gardner v. Gardner*, 87 N. Y., 14.

<sup>30</sup> *Caird v. Campbell*, 1 Mol., 484.

<sup>31</sup> *Atkinson v. Beckett*, 36 West Va., 438, 15 S. E., 179; *Gage v. Parker*, 178 Ill., 455, 53 N. E., 317. But in *Samis v. King*, 40 Conn., 298, it is said that the reversal by the Supreme Court of a decree granting a permanent injunction does not impair or do away with a temporary injunction granted by

the court below in the same cause, but that it remains in full force until dissolved in due course of law. But in this case the reversal was because of a misjoinder of parties, and the cause was remanded in order that the missing party might be supplied.

<sup>32</sup> *Lockwood v. Wickes*, 21 C. C. A., 257, 75 Fed., 118. And see, *post*, § 1701 *a*.

## II. DISSOLUTION UPON ANSWER.

- § 1505. Injunction dissolved on answer denying plaintiff's equities.
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- 1524. Further exceptions to the general rule.
- 1525. Bill upon information and belief.
- 1526. Want of probable cause; plaintiff's right supported by evidence.
- 1527. Waiver of answer under oath.

§ 1505. **Injunction dissolved on answer denying plaintiff's equities.** Upon motion to dissolve an injunction on bill and answer, the answer, in so far as it is responsive to the bill, is taken as true.<sup>1</sup> And it is a well settled rule that when the sworn answer fully and unequivocally denies all the material allegations of the bill upon which complainant's equities rest, the injunction will be dissolved.<sup>2</sup> And

<sup>1</sup> *Harris v. Sangston*, 4 Md. Ch., 522; *Caulfield v. Curry*, 63 Mich., 394.

<sup>2</sup> *Couch v. Ulster Turnpike Co.*, 594, 30 N. W., 191; *Blum v. Loggins*, 53 Tex., 121; *Moore v. Steelman*, 80 Va., 331; *Anderson v. Johns*, 4 Johns. Ch., 26; *Hollister v. Barkley*, 9 N. H., 230; *Armstrong v. Reed*, 11 Iowa, 177; *Stevens v. Sanford*, 7 Minn., 49; *Pineo v. Hefelinger*, 29 Minn., 183, 12 N. W., 515; *Myers*, *ib.*, 183; *Taylor v. Dickinson*, 15 Iowa, 483; *Hatch v. Dan-*

where it is shown by a special plea that there is no equity in the bill, the result, so far as regards the motion to dissolve, is the same as if the allegations of the bill were fully denied by answer.<sup>3</sup> It is to be observed, however, that the rule requires positive averments in the answer, and not mere general allegations of denial based on information and belief.<sup>4</sup> In other words, the denial must be of the same positive character as the averments in the bill on which complainant's equities are based, and where in the bill material facts are positively averred, a denial in the answer of sufficient knowledge on which to form a belief does not meet the requirements of the rule.<sup>5</sup> Nor will the answer suffice where it is not fully responsive to the allegations of the bill.<sup>6</sup> But where the allegations of the answer are full and responsive to the bill, and fully deny its equity, the injunction will be dissolved unless apparent irreparable mischief is likely to ensue from its dissolution, or unless some peculiar circumstances exist to warrant a departure from the rule.<sup>7</sup> And for

iels, 1 Halst. Ch., 14; *Washer v. Brown*, Ib., 81; *Morris Canal Co. v. Fagan*, 3 C. E. Green, 215; *Suffern v. Butler*, Ib., 220; *Parkinson v. Trousdale*, 3 Scam., 367; *Harris v. Sangston*, 4 Md. Ch., 394; *Furlong v. Edwards*, 3 Md., 99; *Schoeffler v. Schwarting*, 17 Wis., 30; *Roberts v. Anderson*, 2 Johns. Ch., 202; *Kaighn v. Fuller*, 1 McCart., 419; *Magnet M. Co. v. Page & P. S. M. Co.*, 9 Nev., 347; *Brewer v. Day*, 8 C. E. Green, 418; *Keron v. Coon*, 11 C. E. Green, 26; *Woodfin v. Beach*, 70 N. C., 455; *Perry v. Michaux*, 79 N. C., 94; *Stilt v. Hilton*, 3 Stew., 579; *Voshell v. Hynson*, 26 Md., 83; *Rhodes v. Lee*, 32 Ga., 470; *Foxworth v. Magee*, 48 Miss., 532; *Barr v. Collier*, 54 Ala., 39; *Morrison Bros. & Co. v. Cole-*

*man*, 87 Ala., 655, 6 So., 374, 5 L. R. A., 384; *Turner v. Stephens*, 106 Ala., 546, 17 So., 706; *Walker v. Backus H. Co.*, 97 Wis., 160, 72 N. W., 230; *Crombie v. Order of Solon*, 157 Pa. St., 588, 27 Atl., 710; *Grant County v. C. & U. S. Mortgage Co.*, 3 S. Dak., 390, 53 N. W., 746; *Ireland v. Kelly*, 60 N. J. Eq., 608, 47 Atl., 51.

<sup>3</sup> *Eldred v. Camp*, *Harring*. (Mich.), 162. See also *Hiller v. Collins*, 63 Cal., 235.

<sup>4</sup> *Doyb v. Barnes*, 4 Gill, 1; *Attorney-General v. Oakland County Bank*, *Walk*. (Mich.), 90.

<sup>5</sup> *Smith v. Appleton*, 19 Wis., 468.

<sup>6</sup> *Ireland v. Kelly*, 60 N. J. Eq., 308, 47 Atl., 51.

<sup>7</sup> *Satterfield v. John*, 53 Ala., 127.

the purposes of the rule under discussion, it is only necessary that the answer should deny such facts as constitute the equity of the bill.<sup>8</sup> And where such facts are unequivocally denied, it is no objection that the answer sets up additional matters of a defensive nature, which are not responsive to the allegations of the bill.<sup>9</sup>

§ 1506. **The rule illustrated.** In conformity with the general rule, an injunction against proceedings at law, obtained on the ground of fraud, will be dissolved where the answer fully and clearly disproves all fraud and shows a *bona fide* indebtedness and full consideration for the judgment, and it not appearing that the suits, although several in number, are malicious or vexatious.<sup>10</sup> So an injunction to a judgment at law will be dissolved upon the coming in of the answer fully denying complainant's equity, except as to one point on which defendant is ignorant, and which is not charged by the bill to be within his knowledge, every other allegation upon which complainant's equity rests being fully and positively denied.<sup>11</sup> And when an injunction is granted against the prosecution of an action of replevin upon the ground of fraud, it will be dissolved upon answer of the defendants denying all fraud. Nor does it afford any objection to the dissolution in such case that there are pleas to the bill still undisposed of, when no advantage was taken of that point in the court below upon the motion to dissolve.<sup>12</sup>

§ 1507. **Denial upon information and belief.** The rule requiring the averments of the answer to be positive, and not upon information and belief, is occasionally relaxed where, from the nature of the case, the defendant can not deny the allegations of the bill upon his own personal knowledge. Thus,

<sup>8</sup> Marvel v. Ortlip, 3 Del. Ch., 9.

<sup>10</sup> Jackson v. Darcy, Saxt., 194.

<sup>9</sup> Howard v. Randolph, 73 Tex., 454, 11 S. W., 495. And see, *ante*,

<sup>11</sup> Capehart v. Mhoon, Busb. Eq., 30.

§ 1481. But see, *contra*, Birmingham M. R. R. Co. v. City of Bessemer, 98 Ala., 274, 13 So., 487.

<sup>12</sup> Foxworth v. Magee, 48 Miss., 532.

where the answer is by the administrator of one who was a party to the contract out of which the alleged equities arose, and it denies those equities upon information and belief, such denial, if sustained and strengthened by some of the allegations of the bill, and if in itself consistent and probable, will warrant a dissolution of the injunction.<sup>13</sup> And it has been held that where plaintiff neglects to make party defendant one who is personally cognizant of all the facts and who should be joined as a party, defendants having no personal knowledge of the equities of the bill, are entitled to a dissolution upon their answer denying those equities upon information and belief.<sup>14</sup> But in the absence of such circumstances tending to strengthen the averments of the answer of a defendant, who, from his representative character as an executor or administrator, can have no personal knowledge of the facts, his denial upon information and belief will not warrant a dissolution where the equities of the bill are positively charged.<sup>15</sup>

§ 1508. **Exceptions to the general rule.** To the general rule that a preliminary injunction will be dissolved on the coming in of the answer fully denying the equities of the bill, there are numerous exceptions, based upon recognized principles of equity, which may not inappropriately be noticed in this connection. And, in the first place, it is to be constantly borne in mind that the dissolution, like the granting of interlocutory injunctions, is largely a matter of judicial discretion, to be determined by the nature of the particular case under consideration. A dissolution, therefore, does not follow necessarily and of course upon the coming in of the answer denying the material allegations of the bill upon which the injunction issued, and the court may, in the exercise of a

<sup>13</sup> Clayton v. Lyle, 2 Jones Eq., 188; Coale v. Chase, 1 Bland, 136. But see, *contra*, Williams v. Stevens, Adm'r, 1 Halst. Ch., 119.

<sup>14</sup> De Groot v. Wright, 3 Halst. Ch., 576.

<sup>15</sup> Powell v. Brown, 22 Ga., 275.

sound judicial discretion, refuse a dissolution and continue the injunction to the hearing, where the circumstances of the case seem to demand this course.<sup>16</sup> Especially will this discretion be exercised where fraud is the *gravamen* of the bill,<sup>17</sup> or where it is apparent to the court that a dissolution of the injunction would result in greater injury and hardship than its continuance to the hearing,<sup>18</sup> or where it is ap-

- <sup>16</sup> *Chetwood v. Brittan*, 1 Green Ch., 438; *Irick v. Black*, 2 C. E. Green, 189; *Firmstone v. DeCamp*, 2 C. E. Green, 309; *Shellman v. Scott*, Charl. R. M., 380; *Albany City Bank v. Schermerhorn*, Clarke Ch., 303; *Attorney-General v. Oakland County Bank*, Walk. (Mich.), 90; *Orr v. Littlefield*, 1 Woodb. & M., 13; *Linton v. Denham*, 6 Fla., 533; *Hayden v. Thrasher*, 20 Fla., 715; *Blackwell M. Co. v. McElwee*, 94 N. C., 425; *Walker v. Stone*, 70 Iowa, 103, 30 N. W., 39; *Kelley v. Briggs*, 58 Iowa, 332, 12 N. W., 299; *Friedlander v. Ehrenworth*, 58 Tex., 350; *Kahn v. Kerngood*, 80 Va., 342; *Jenkins v. Waller*, 80 Va., 668; *Hoagland v. Titus*, 1 McCart., 81; *Holt v. Bank of Augusta*, 9 Ga., 552; *Dent v. Summerlin*, 12 Ga., 5; *Hammett v. Christie*, 21 Ga., 251; *New v. Bame*, 10 Paige, 502; *Dey v. Dey*, 8 C. E. Green, 88; *Murray v. Elston*, 8 C. E. Green, 127; *Cregar v. Creamer*, 12 C. E. Green, 281; *Snyder v. Seeman*, 41 N. J. Eq., 405; *Owen v. Brien*, 2 Tenn. Ch., 295; *DeGodey v. Godey*, 39 Cal., 157; *McCreery v. Brown*, 42 Cal., 457; *Porter v. Jennings*, 89 Cal., 440, 26 Pac., 965; *Harrison v. Yerby*, 87 Ala., 185, 6 So., 3; *Whitley v. Dunham Lumber Co.*, 89 Ala., 493, 7 So., 810; *Birmingham M. & M. Co. v. Mutual L. & T. Co.*, 96 Ala., 364, 11 So., 386; *New England M. S. Co. v. Powell*, 97 Ala., 483, 12 So., 55; *Planters' Bank v. Lauchheimer*, 102 Ala., 454, 14 So., 776; *Niehaus v. Cooke*, 134 Ala., 223, 32 So., 728; *Moore v. Sugg*, 112 N. C., 233, 17 S. E., 72; *Huron Waterworks Co. v. City of Huron*, 3 S. Dak., 610, 54 N. W., 652; *Robrecht v. Robrecht*, 46 West Va., 738, 34 S. E., 801; *Hamilton v. Wood*, 55 Minn., 482, 57 N. W., 208; *Valley Iron Works Mfg. Co. v. Goodrick*, 103 Wis., 436, 78 N. W., 1096; *Milwaukee E. R. & L. Co. v. Bradey*, 108 Wis., 467, 84 N. W., 870; *Quayle v. Bayfield County*, 114 Wis., 108, 89 N. W., 892.
- <sup>17</sup> *Dent v. Summerlin*, 12 Ga., 5; *Mulock v. Mulock*, 11 C. E. Green, 461; *Stewart v. Johnston*, 44 Iowa, 435; *Brigham v. White*, 44 Iowa, 677; *Johnston v. C., M. & St. P. R. Co.*, 58 Iowa, 537, 12 N. W., 576; *Walker v. Stone*, 70 Iowa, 103, 30 N. W., 39; *Hayden v. Thrasher*, 20 Fla., 715; *Rigsbee v. Town of Durham*, 98 N. C., 81, 3 S. E., 749; *Friedlander v. Ehrenworth*, 58 Tex., 350; *Kahn v. Kerngood*, 80 Va., 342; *Jenkins v. Waller*, 80 Va., 668. See also *Sinnett v. Moles*, 38 Iowa, 25.
- <sup>18</sup> *Chetwood v. Brittan*, 1 Green Ch., 438; *Firmstone v. DeCamp*, 2

parent that by the dissolution complainant would lose all the benefit which would otherwise accrue to him should he finally succeed in his cause.<sup>19</sup> And where the injunction is the sole relief sought by the bill, a temporary injunction should not be dissolved upon the denials of the answer, since this would be in effect to render judgment for the defendant because he denies the plaintiff's right.<sup>20</sup> Nor should the injunction be dissolved where its dissolution would result in irreparable injury to the plaintiff.<sup>21</sup> And a court of last resort will be loath to disturb the action of the court below in thus denying a motion to dissolve, unless an abuse of its discretion is shown.<sup>22</sup>

§ 1509. **Further exceptions.** In the exercise of this discretion, a dissolution will not be allowed where auxiliary evidence of complainant's right is before the court, sufficient to sustain the bill, even though its material averments be denied by the answer.<sup>23</sup> And where the facts and entire history of the case, as disclosed by bill and answer, afford strong presumption that complainant will establish his claim for relief upon the hearing, and that he might in the meantime suffer irremediable injury by the dissolution, the injunction will be

C. E. Green, 309; *Whitley v. Dunham Lumber Co.*, 89 Ala., 493, 7 So., 810; *Birmingham M. & M. Co. v. Mutual L. & T. Co.*, 96 Ala., 364, 11 So., 386; *Planters' Bank v. Lauchheimer*, 102 Ala., 454, 14 So., 776; *Hamilton v. Wood*, 55 Minn., 482, 57 N. W., 208; *Huron Waterworks Co. v. City of Huron*, 3 S. Dak., 610, 54 N. W., 652.

<sup>19</sup> *Attorney-General v. Oakland County Bank, Walk.* (Mich.), 90; *Fargo v. Ames*, 45 Iowa, 494; *Simon v. Townsend*, 12 C. E. Green, 302; *Supervisors v. Paxton*, 56 Miss., 679; *Valley Iron Works Mfg.*

*Co. v. Goodrick*, 103 Wis., 436, 78 N. W., 1096.

<sup>20</sup> *Porter v. Jennings*, 89 Cal., 440, 26 Pac., 965.

<sup>21</sup> *Harrison v. Yerby*, 87 Ala., 185, 6 So., 3; *Milwaukee E. R. & L. Co. v. Bradley*, 108 Wis., 467, 84 N. W., 870.

<sup>22</sup> *DeGodey v. Godey*, 39 Cal., 157; *McCreery v. Brown*, 42 Cal., 457; *Harrison v. Yerby*, 87 Ala., 185, 6 So., 3.

<sup>23</sup> *Orr v. Littlefield*, 1 Woodb. & M., 13; *Conover v. Ruckman*, 34 N. J. Eq., 293.



retained.<sup>24</sup> So where the case as presented by the bill is one which seems to require investigation, and the effect of dissolving the injunction would be to place the property which is the subject of controversy beyond the control of the court in which the action is pending, and would be equivalent to a complete denial of the relief sought by the bill, the injunction will not be dissolved.<sup>25</sup> So, too, where the circumstances of the case, as disclosed in the answers of both of two defendants, seem to require that the injunction should be continued, it will not be dissolved upon the answers, but will be retained until the hearing.<sup>26</sup>

§ 1510. **Injunction retained in cases of doubt.** Where it is apparent from the answer that there are still questions of doubt, on which additional light is requisite to satisfy the court before deciding the rights of the parties, a dissolution should not be granted.<sup>27</sup> Especially is this true where the very purpose for which the relief was originally allowed was the prevention of irreparable injury.<sup>28</sup> Or if a reasonable doubt exists as to whether the equity of the bill is sufficiently negatived by the answer to warrant a dissolution, it is not error for the court to refuse to dissolve the injunction and to order it to stand over that proofs may be taken.<sup>29</sup>

§ 1511. **Retained when defendant not prejudiced.** If the continuance of the injunction, even admitting defendant's answer to be true, can not prejudice or imperil his rights, and

<sup>24</sup> *Linton v. Denham*, 6 Fla., 533; *Steas v. Kranz*, 32 Minn., 313, 20 N. W., 241.

<sup>25</sup> *Hoagland v. Titus*, 1 McCart., 81; *Owen v. Brien*, 2 Tenn. Ch., 295.

<sup>26</sup> *Hammett v. Christie*, 21 Ga., 251. See also *Scott v. Hartman*, 11 C. E. Green, 89; *Ely v. Crane*, 37 N. J. Eq., 157.

<sup>27</sup> *Kuhl v. Martin*, 11 C. E. Green, 60; *Lowe v. Board of Com-*

*missioners*, 70 N. C., 532; *Whittaker v. Hill*, 96 N. C., 2, 1 S. E., 639; *Caldwell v. Stirewalt*, 100 N. C., 201, 6 S. E., 262; *Town of Durham v. R. & D. R. Co.*, 104 N. C., 261, 10 S. E., 208; *Fargo v. Ames*, 45 Iowa, 494.

<sup>28</sup> *Purnell v. Daniel*, 8 Ired. Eq., 3.

<sup>29</sup> *James v. Lemly*, 2 Ired. Eq., 278; *Monroe v. McIntyre*, 6 Ired. Eq., 65.

on the other hand its dissolution might seriously impair the rights of complainant, the motion to dissolve upon the coming in of the answer should not be allowed.<sup>30</sup> Thus, in the case of an injunction in aid of a creditor's bill, the answer of the defendant denying the ownership of any property, or interests in property of any nature whatever, does not necessarily entitle him to a dissolution of the injunction restraining him from disposing of his property. In such case, if the answer be true, the injunction can work no injury to defendant, and if, notwithstanding his answer, he is possessed of property, the injunction should be continued for the protection of the creditors.<sup>31</sup> So where the fact is disclosed by defendants' answer that they have no substantial interest in the subject-matter of the action, such interest being in a third person, not a party to the bill, and that the interests of the defendants can not be prejudiced by continuing the injunction, while complainant's rights may be seriously jeopardized, the writ will not be dissolved on such answer.<sup>32</sup>

§ 1512. **Further exceptions.** It is also held that where the injunction is not merely ancillary to some other and principal relief sought by the action, but is itself the principal relief desired, and its dissolution would be equivalent to a dismissal of the action, if a reasonable doubt exists in the mind of the court whether the bill is sufficiently negatived by the answer, it is proper to refuse a dissolution and to continue the injunction to the hearing.<sup>33</sup> So when the questions presented by the bill upon which a preliminary injunction has been granted are novel and important and are awaiting an adjudication in the court of last resort of the state in a litigation between the same parties, a motion to dissolve upon

<sup>30</sup> *New v. Bame*, 10 Paige, 502;  
*McCorkle v. Brem*, 76 N. C., 407;  
*Jones v. Brandon*, 60 Miss., 556.

<sup>31</sup> *New v. Bame*, 10 Paige, 502.

<sup>32</sup> *James v. Norris*, 4 Jones Eq., 225.

<sup>33</sup> *Lowe v. Board of Commissioners*, 70 N. C., 532; *Marshall v. Commissioners*, 89 N. C., 103.

bill and affidavits may properly be denied.<sup>34</sup> And if the question of fact upon which the right to the injunction depends is evenly balanced upon the affidavits on the motion to dissolve, the motion should be denied and the injunction retained until the final hearing.<sup>35</sup>

§ 1513. **Denial must be full and unequivocal.** The rule that an answer fully denying the equities of the bill entitles defendant to a dissolution must be understood as applying only to cases where the answer is properly responsive to the bill and where its denials are explicit and direct, traversing the allegations of fact on which the writ was granted. It is not sufficient that it deny the inferences to be drawn from those facts, or deny their effect, and such answer does not constitute sufficient ground for a dissolution.<sup>36</sup> Nor will a merely technical or equivocal denial meet the requirements of the rule, especially when it is manifest from the entire case that the aid of the court is still necessary for the protection of plaintiffs.<sup>37</sup> And where defendant by his affidavit makes a mere general denial, without traversing all the facts on which plaintiff's equities rest, the injunction will not be dissolved.<sup>38</sup> Or if the answer neither admits nor denies, unless by implication, the positive allegations of the bill, it is proper to refuse a dissolution and to continue the injunction until the hearing.<sup>39</sup> And if the answer is unsatisfactory as to a material equity of plaintiff's case, it is proper to continue the injunction to the hearing.<sup>40</sup> So if it fails to deny material statements of the bill upon which the injunction was

<sup>34</sup> *Morris & E. R. Co. v. Haskins*, 11 C. E. Green, 295.

<sup>35</sup> *St. Joseph & D. C. R. Co. v. Dryden*, 11 Kan., 186.

<sup>36</sup> *Teasey v. Baker*, 4 C. E. Green, 61; *Coleman v. Hudspeth*, 49 Miss., 562; *Richardson v. Lightcap*, 52 Miss., 508.

<sup>37</sup> *Merwin v. Smith*, 1 Green Ch.,

182; *Woodruff v. Ritter*, 11 C. E. Green, 86.

<sup>38</sup> *Pyecroft v. Pyecroft*, 2 Sm. & Gif., 326.

<sup>39</sup> *Ladies Benevolent Society v. Benevolent Society*, 2 Tenn. Ch., 77.

<sup>40</sup> *Gibby v. Hall*, 12 C. E. Green, 282.

granted, the court may refuse to dissolve.<sup>41</sup> Nor will an answer by way of confession and avoidance, as distinguished from a direct traverse, suffice to meet the requirements of the rule.<sup>42</sup> So, too, if the bill asserts a title in plaintiff, for the protection of which the injunction is sought, a dissolution will not be allowed upon an answer which does not fully and positively deny plaintiff's title.<sup>43</sup>

§ 1514. **Denial must be based on actual knowledge.** It is also to be borne in mind that the general rule under discussion, by which a dissolution is allowed upon a sworn answer fully denying the equities of the bill, is applicable only when the denials are based upon the actual knowledge of the person denying under oath, and a mere denial upon information and belief will not suffice within the meaning of the rule.<sup>44</sup> And if the equities of the bill are not thus denied upon actual knowledge, they may be taken as true upon the motion to dissolve; and so of every allegation which is neither admitted nor denied by the answer.<sup>45</sup> So where the denial of the answer is based upon mere hearsay evidence, where primary evidence is attainable, the answer is insufficient upon a motion to dissolve.<sup>46</sup> The answer should also distinguish between what is denied upon personal knowledge and what upon information and belief; and when it is sworn by the solicitor of defendants, who does not claim to have any knowledge or even information of the facts, it will be regarded as the oath of a stranger to the

<sup>41</sup> *Large v. Ditmars*, 12 C. E. Green, 283.

<sup>42</sup> *Jackson v. Jackson*, 84 Ala., 343, 4 So., 174; *Maclary v. Reznor*, 3 Del. Ch., 445.

<sup>43</sup> *Coleman v. Hudspeth*, 49 Miss., 562.

<sup>44</sup> *Higbee v. Camden & A. R. Co.*, 4 C. E. Green, 276; *Pierson v. Ryerson*, 1 Halst. Ch., 196; *Ward v. Van Bokkelen*, 1 Paige, 100; *Tyne v. Dougherty*, 3 Tenn. Ch., 52;

*Cole Co. v. Virginia Co.*, 1 Sawy., 685; *Hart v. Clark*, 54 Ala., 490; *Miller v. McDougall*, 44 Miss., 682; *Sinnett v. Moles*, 38 Iowa, 25; *Turner v. Cuthrell*, 94 N. C., 239; *Lake Shore & M. S. R. Co. v. Felton*, 43 C. C. A., 189, 103 Fed., 227.

<sup>45</sup> *Tyne v. Dougherty*, 3 Tenn. Ch., 52.

<sup>46</sup> *Niehaus v. Cooke*, 134 Ala., 223, 32 So., 728.

transaction, and will not suffice to dissolve the injunction.<sup>47</sup> And an allegation in the answer that defendant has no knowledge touching a material averment of the bill is insufficient to warrant a dissolution.<sup>48</sup>

§ 1515. **Further requisites of answer.** To entitle defendants to a dissolution, their answer must be at least credible,<sup>49</sup> and it must be responsive to the material allegations of the bill;<sup>50</sup> otherwise the injunction will be continued to the hearing. And in no event will a dissolution be allowed upon an answer not under oath, and without evidence of the truth of the matters alleged in defense.<sup>51</sup> So to warrant an application of the rule that the injunction will be dissolved upon answer denying the equities of the bill, the answer must be of such a character as completely to counterbalance the case presented by the bill, leaving nothing to inference or presumption. In other words, the denial should be direct and positive, and by one who has personal knowledge of the facts denied. And if the answer is not a satisfactory denial, and is not sufficient to remove reasonable and well founded doubts in the mind of the court, the injunction may be retained.<sup>52</sup>

<sup>47</sup> *Miller v. McDougall*, 44 Miss., 682. But under the practice in Alabama the court may, notwithstanding the answer is verified only upon information and belief, entertain a motion to dissolve for want of equity in the bill, and if the bill has no equity the motion will be sustained. *Hart v. Clark*, 54 Ala., 490.

<sup>48</sup> *Gates v. Ballou*, 54 Iowa, 485, 6 N. W., 701.

<sup>49</sup> *Moore v. Hylton*, 1 Dev. Eq., 433.

<sup>50</sup> *Rich v. Thomas*, 4 Jones Eq., 71.

<sup>51</sup> *Gray v. McCance*, 11 Ill., 325.

<sup>52</sup> *Sinnett v. Moles*, 38 Iowa, 25.

But in *Tainter v. Lucas*, 29 Wis., 375, it is held that the denials in the answer need only be of the same character as the statements in the bill. And the bill alleging that certain municipal officers had acted fraudulently and corruptly in levying a tax, such allegation, however positive in form, could in effect be made only upon information and belief; and the action to enjoin the tax being brought against officers not charged with fraud, their answer upon information and belief denying the fraud alleged against the others was held sufficient to warrant a dissolution.

§ 1516. **Effect of plaintiff's laches.** A critical examination of the cases wherein a departure has been allowed from the general rule, that defendant is entitled to a dissolution on filing his answer denying the equities of the bill, will show that in every instance the departure has been warranted by special circumstances, appealing strongly to the exercise of a sound judicial discretion, and warranting the court in retaining the injunction, notwithstanding the denial of the averments of the bill, in order that substantial justice might be done between the parties. But such discretion will not be exercised in behalf of one who has been grossly negligent in the assertion of his rights; and where plaintiff has been guilty of great laches, and has allowed an unreasonable length of time to elapse without taking any steps in his cause, the general rule will not be departed from, and the injunction will be dissolved upon the coming in of the answer denying complainant's equities.<sup>53</sup>

§ 1517. **Denial in part.** If the answer negative only a part of the equity of the bill, it will not suffice to warrant the court in dissolving the injunction, and under such circumstances it will usually be continued to the hearing.<sup>54</sup> Where, however, a discrimination may properly be made, and the injunction may be dissolved in part and retained as to the remainder, if the answer satisfactorily denies a portion of the equity of the bill, a dissolution may be allowed *pro tanto*.<sup>55</sup>

§ 1518. **Insufficient answer.** Where defendant's answer is illusory, and is deficient in frankness and candor, the injunction will be retained.<sup>56</sup> Thus, an averment in an answer that certain material facts are substantially correct, so far as concerns the defendants, is defective both in form and substance, and is not sufficient to entitle defendants to a dissolution.<sup>57</sup> So

<sup>53</sup> *Greenin v. Hoey*, 1 Stockt., 137.

<sup>56</sup> *Little v. Marsh*, 2 Ired. Eq., 18.

<sup>54</sup> *Jackson v. Jones*, 25 Ga., 93.

<sup>57</sup> *Carr v. Weld*, 3 C. E. Green,

<sup>55</sup> *Edwards v. Perryman*, 18 Ga., 41.  
374.

if the answer makes no denial of the averments of the bill on which complainant's equity rests, but simply asserts that defendant does not believe and can not admit them, it is insufficient to warrant a dissolution.<sup>58</sup> And where, after the coming in of the answer, enough of the bill still remains undisputed to render it probable that complainant will sustain his claim for relief, the injunction will not be dissolved.<sup>59</sup> And an injunction which has been granted upon notice and affidavits of both parties, especially upon the affidavits of defendants themselves, going to the merits of the cause, will not be dissolved on answer, but will be continued to the hearing.<sup>60</sup>

§ 1519. **Answer by corporation.** Where a corporation is made a defendant in equity, an answer under the corporate seal and without oath is generally sufficient for ordinary purposes, and this is the usual mode of answering by corporate bodies. But for the purposes of a motion to dissolve an injunction, such an answer verified merely by the corporate seal is not sufficient, and the oath of some officer of the corporation, or other person acquainted with the facts alleged in the answer, is also necessary.<sup>61</sup>

§ 1520. **Injunction until coming in of answer; reviving injunction.** A preliminary injunction, granted until the coming in of the answer, or until further order of the court, is not dissolved, *ipso facto*, by the coming in of the answer, but requires an order for that purpose.<sup>62</sup> It is held, however, that no motion to dissolve is necessary in such a case.<sup>63</sup>

<sup>58</sup> Kent *v.* Ricards, 3 Md. Ch., 392. Ga., 435; Griffin *v.* State Bank, 17 Ala., 258. See also Jewett *v.* Bowman, 12 C. E. Green, 171.

<sup>59</sup> Sherrill *v.* Harrell, 1 Ired. Eq., 194. <sup>62</sup> Turner *v.* Scott, 5 Rand., 332;

<sup>60</sup> Sinnickson *v.* Johnson, 2 Green Ch., 374. Orddeen *v.* Oakley, 2 DeG., F. & J., 158.

<sup>61</sup> Fulton Bank *v.* New York & Sharon Canal Co., 1 Paige, 311; Hemphill *v.* Ruckersville Bank, 3 <sup>63</sup> Beal *v.* Gibson, 4 Hen. & M., 481.

But on it being satisfactorily made to appear to a court of equity that an injunction has been irregularly and improperly dissolved, it will be revived.<sup>64</sup> And it may be said generally, that courts of equity are always open to reinstate as well as to grant injunctions.<sup>65</sup> But the fact that an indictment for forgery has been found upon the answer on which a dissolution was allowed does not constitute sufficient ground for reviving the injunction.<sup>66</sup>

§ 1521. **Evasive answer insufficient.** An injunction will not be dissolved upon an answer which is evasive as to the material allegations of the bill.<sup>67</sup> Thus, in the case of an injunction restraining defendant from removing his property beyond the limits of the state, if defendant answers evasively as to his intention to remove his property, and also evades the allegation of his insolvency, which was one of the grounds for granting the relief, the injunction will not be dissolved, especially if defendant bases his rights upon a doubtful question of law; in such a case it is the duty of the court to continue the writ until a hearing upon the merits.<sup>68</sup>

§ 1522. **Injunctions in aid of discovery.** Injunctions granted merely for purposes of discovery, and in aid of a defense at law, are usually dissolved upon the filing of the answer. Such injunctions being merely auxiliary in their nature, and only intended to stay proceedings until a discovery is obtained, when the object is accomplished no necessity exists for their further retention, and they are accordingly dissolved on the coming in of the answer.<sup>69</sup> Thus, in the case of an injunction restraining legal proceedings, on a bill for discovery and in aid of a defense at law, defendant's answer denying the allega-

<sup>64</sup> *Billingslea v. Gilbert*, 15; *Forney v. Calhoun Co.*, 84 Ala., Bland, 566. And see *Beal v. Gibson*, 4 Hen. & M., 481. 215, 4 So., 153.

<sup>65</sup> *Radford's Ex'rs v. Innes' Excutrix*, 1 Hen. & M., 8. <sup>68</sup> *Wilson v. Mace*, 2 Jones Eq., 5.

<sup>66</sup> *Clapham v. White*, 8 Ves., 35. <sup>69</sup> *King v. Clark*, 3 Paige, 76; *Grafton v. Brady*, 3 Halst. Ch., 79.

<sup>67</sup> *Wilson v. Mace*, 2 Jones Eq.,



tions of the bill as to those matters concerning which the discovery is sought, and making no discovery, the injunction will be dissolved.<sup>70</sup> And it has been held that defendant in such a case is entitled to a dissolution, regardless of whether his answer admits or denies the facts charged in the bill.<sup>71</sup>

§ 1523. **Pendency of exceptions to answer.** The pendency of exceptions to the answer will not prevent the court from dissolving the injunction, when the answer fully denies the equities of the bill, and when the exceptions do not affect the matters upon which plaintiff's claim for the injunction is founded.<sup>72</sup>

§ 1524. **Further exceptions to the general rule.** If the effect of dissolving the injunction upon the coming in of the answer would be to permit defendants to proceed at law for the enforcement of their demand against the fund in litigation, the entire subject-matter and all the parties being within the jurisdiction of the court of equity in the injunction cause, and that court having power to adjust the whole controversy, it is proper to deny the motion to dissolve.<sup>73</sup> So if the bill shows a probable right, and a probable danger to that right without the intervention of the court through its injunction, a dissolution will not ordinarily be allowed upon a pure question of law, unless the question is plain beyond a reasonable doubt. And when such question is not free from difficulty, the better course is to refuse the motion to dissolve and to retain the injunction until the final hearing.<sup>74</sup>

§ 1525. **Bill upon information and belief.** The rule being general and well established that, to warrant an injunction in

<sup>70</sup> *Grafton v. Brady*, 3 Halst. Ch., 79.

<sup>71</sup> *King v. Clark*, 3 Paige, 76.

<sup>72</sup> *Stitt v. Hilton*, 31 N. J. Eq. (4 Stew.), 235, affirming S. C., 30 N. J. Eq. (3 Stew.), 579. See also *Mitchell v. Mitchell*, 5 C. E. Green, 234. But the rule was different

under the English Chancery practice. See *Howes v. Howes*, 1 Beav., 197; *Williams v. Davis*, 1 Sim. & Stu., 262.

<sup>73</sup> *Mosser v. Pequest Mining Co.*, 11 C. E. Green, 200.

<sup>74</sup> *Nashville Savings Bank v. Mayor*, 3 Tenn. Ch., 338.

the first instance, the statements of the bill must be positive and within plaintiff's knowledge, or if upon information and belief that they must be supported by the statements of persons cognizant of the facts, it is not error to dissolve an injunction which has been granted in disregard of this rule.<sup>75</sup> And when most of the material allegations of the bill are stated upon information and belief, and these are denied by the answers and affidavits on the part of defendants, the injunction should be dissolved.<sup>76</sup>

§ 1526. **Want of probable cause; plaintiff's right supported by evidence.** Where a motion to dissolve is heard upon bill, answer and depositions used as affidavits, and the evidence does not show probable cause from which it may reasonably be inferred that plaintiff will be able to make out his case upon final hearing, the injunction will be dissolved.<sup>77</sup> If, however, plaintiff's right to relief is supported by evidence regularly taken in the cause in his behalf, and on which he intends to rely upon the final hearing, the injunction will not be dissolved upon bill and answer alone, but will be ordered to stand over until the hearing.<sup>78</sup>

§ 1527. **Waiver of answer under oath.** If plaintiff waives the answer of defendant under oath, while such waiver deprives the answer of its effect as evidence, and dispenses with the necessity which would otherwise exist of disproving it by testimony equivalent to that of two witnesses, yet such answer, if it negatives the equities of the bill, must be treated upon a motion to dissolve as a denial of plaintiff's case. It is proper, therefore, upon such motion to give to such an answer the effect of a sworn denial.<sup>79</sup>

<sup>75</sup> Lee v. Clark, 49 Ga., 81.

<sup>76</sup> Cunningham v. Tucker, 14 Fla., 251.

<sup>77</sup> Craycroft v. Morehead, 67 N. C., 422; Ingles v. Straus, 91 Va., 209, 21 S. E., 490.

<sup>78</sup> Christie v. Griffing, 9 C. E. Green, 76.

<sup>79</sup> Lockhart v. City of Troy, 48 Ala., 579; Ingles v. Straus, 91 Va., 209, 21 S. E., 490; Ireland v. Kelly, 60 N. J. Eq., 308, 47 Atl., 51. See also Manchester v. Dey, 6 Paige, 295.

### III. INJUNCTIONS AGAINST SEVERAL DEFENDANTS.

- § 1528. The general rule.  
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§ 1528. **The general rule.** The general rule as to the dissolution of injunctions granted against several defendants jointly, is that a dissolution will not be allowed until all the defendants implicated in the charge have fully answered, denying the equities of the bill.<sup>1</sup> The rule is based upon the necessity of protecting the rights of complainant by retaining the injunction until the personal knowledge of all the defendants has been tested as to the facts alleged in the bill, and until this is done complainant has a right to insist upon the protection of the court.<sup>2</sup>

§ 1529. **Modifications of the rule.** It is to be noticed, however, that the rule as here stated is limited by three important modifications or exceptions. The first of these is that complainant must have used due diligence in taking the necessary steps to expedite his cause and to procure the answers of all the defendants.<sup>3</sup> Equity rarely, if ever, extends its protection to those who have been negligent in the assertion of their rights, and complainants, who have been guilty of laches in compelling the answer of defendants, can not complain if a disso-

<sup>1</sup> *Noble v. Wilson*, 1 Paige, 164; *Smith v. Loomis*, 1 Halst. Ch., 60; *Johnston v. Alexander*, 6 Ark., 302. See *Prickett v. Tuller*, 29 N. J. Eq. (2 Stew.), 154.

<sup>2</sup> *Coleman v. Gage*, Clarke Ch., 295.

<sup>3</sup> *Mallett v. Weybossett Bank*, 1 Barb., 217; *Depeyster v. Graves*, 2 Johns. Ch., 148; *Stoutenburgh v. Peck*, 3 Green Ch., 446; *Johnston v. Alexander*, 6 Ark., 302; *Noble v. Wilson*, 1 Paige, 164; *Shonk v. Knight*, 12 West Va., 667.

lution is allowed before the answers of all the defendants enjoined have been filed. Thus, where the answers of some of the defendants were in, and the others could have been obtained by due diligence, but complainant had neglected for a period of nine months to procure them, a dissolution was properly granted.<sup>4</sup> A second modification of the rule is, that the answer is required of those defendants only upon whom rests the *gravamen* of the charge, and where such defendants have fully answered, denying the material allegations of the bill, the injunction may be dissolved, notwithstanding other defendants have not yet answered.<sup>5</sup> Thus, the answer of defendants who are joined merely as formal or nominal parties to the action will not be insisted upon, since such answer can not vary or alter the effect of the answers of the real defendants in interest, nor deprive them of their right to a dissolution upon negating the equities of the bill.<sup>6</sup> So where it is apparent upon the face of the answer itself that all the defendants who have any personal knowledge of the matters in controversy have answered, denying the allegations of the bill, and that the defendant not answering is ignorant of the facts in issue, the injunction should be dissolved.<sup>7</sup> Nor does it matter that the answer in such case contains new matter in addition to that in denial, provided all the material averments of the bill are clearly denied.<sup>8</sup> And when one of

<sup>4</sup> *Depeyster v. Graves*, 2 Johns. Ch., 148.

<sup>5</sup> *Higgins v. Woodward*, Hopk., 342; *Seebor v. Hess*, 5 Paige, 85; *Depeyster v. Graves*, 2 Johns. Ch., 148; *Vliet v. Lowmason*, 1 Green Ch., 404; *Stoutenburgh v. Peck*, 3 Green Ch., 446; *Mallett v. Weybossett Bank*, 1 Barb., 217; *Adams v. Hudson County Bank*, 2 Stockt., 535; *Heck v. Vollmer*, 29 Md., 507; *Coleman v. Gage*, Clarke Ch., 295;

*Johnston v. Alexander*, 6 Ark., 302; *Fowler v. Williams*, 20 Ark., 641; *Shricker v. Field*, 9 Iowa, 366; *Shonk v. Knight*, 12 West Va., 667; *Douglass v. County Commissioners*, 23 Fla., 419, 2 So., 776.

<sup>6</sup> *Higgins v. Woodward*, Hopk., 342; *Shricker v. Field*, 9 Iowa, 366.

<sup>7</sup> *Coleman v. Gage*, 1 Clarke Ch., 295.

<sup>8</sup> *Shricker v. Field*, 9 Iowa, 366.

two defendants who are enjoined is a mere stakeholder of the fund in controversy, having no interest therein, the right to such fund being litigated between his co-defendant and the plaintiff, the injunction may be dissolved upon the answer of the contesting defendant denying the equities of the bill, even though a decree *pro confesso* has been taken against the nominal defendant.<sup>9</sup> The third recognized modification of the rule is, that it is applicable only to cases where the injunction was properly granted in the first instance.<sup>10</sup>

§ 1530. **Illustrations.** If one of several defendants enjoined answers with a full denial of the material allegations contained in the bill, and another denies all knowledge, information and belief of the matters in controversy, the injunction may be dissolved without waiting for the answer of a third defendant who can know nothing of the equities of the bill.<sup>11</sup> But where, upon filing a bill, an injunction is allowed against one of several defendants, it will not be dissolved upon his answer negating complainant's equities, if the other defendants by their answers admit all the material allegations of the bill.<sup>12</sup> Where, however, one of the defendants files his answer, and from his own connection with the subject in controversy, and of his own personal knowledge, is able to lay such facts before the court as to render it apparent that complainant has no equity, a motion to dissolve may be granted, without the answer of the other defendant.<sup>13</sup>

§ 1531. **Impossibility of procuring answer.** Where from the circumstances of the case it is impossible to procure the answer

<sup>9</sup> Colton v. Price, 50 Ala., 424.

<sup>10</sup> Mallett v. Weybossett Bank, 1 Barb., 217. And see Depeyster v. Graves, 2 Johns. Ch., 148; Vliet v. Lowmason, 1 Green Ch., 404.

<sup>11</sup> Rockwell v. Lawrence, 1 Halst. Ch., 20.

<sup>12</sup> Zabriskie v. Vreeland, 1 Beas., 179.

<sup>13</sup> Gregory v. Stillwell, 2 Halst. Ch., 51.

of all the defendants, those who have answered denying the equities on which the injunction rests are entitled to a dissolution without further delay. Thus, where the defendant that has not answered is a foreign corporation, not within the jurisdiction of the court, and it is therefore impossible to compel an answer from such defendant, the absence of its answer is not sufficient ground for refusing to dissolve the injunction.<sup>14</sup>

§ 1532. **Greater strictness required in cases of fraud.** Courts of equity are usually more strict in requiring a positive denial from all the defendants before dissolving an injunction granted on the ground of fraud, than in ordinary cases. And where the bill implicates two defendants in the same charge of fraudulent conduct, the court will require the answer of both defendants before granting a motion to dissolve.<sup>15</sup> So where the answer of one of the defendants is not sufficiently full and satisfactory as to the acceptance and subsequent fraudulent relinquishment of a trust, which constituted one of the chief grounds on which the injunction was granted, it will not be dissolved, even though there are no other reasons for retaining it.<sup>16</sup> And where fraud is one of the grounds upon which the injunction was granted, a denial on the part of some of the defendants of fraud as to themselves will not authorize a dissolution, if their title or rights may be affected by the fraud charged against the other defendants.<sup>17</sup>

§ 1533. **Ignorance; absence of defendant; improper joinder.** Mere ignorance of the subject in controversy on the part of the defendants answering the bill, and their consequent inability to deny the material averments on which its equity depends, will not warrant the court in dissolving the injunction. Nor does the fact that the only defendant who can answer such allegations is absent from the state constitute any ground of excep-

<sup>14</sup> *Baltimore & Ohio R. R. v. Wheeling*, 13 Grat., 40.

<sup>15</sup> *Scull v. Reeves*, 2 Green Ch., 84.

<sup>16</sup> *Price v. Clevenger*, 2 Green Ch., 207.

<sup>17</sup> *Schermerhorn v. Merrill*, 1 Barb., 511.

tion to the general rule, and the injunction will, under such circumstances, be retained to the hearing.<sup>18</sup> And on motion to dissolve an injunction against proceedings at law, the fact that a third person, not a party to the action at law, and improperly made a defendant in the injunction suit, was enjoined, will not avail the defendant seeking a dissolution.<sup>19</sup>

§ 1534. **Further illustrations.** Where the officers of a corporation are joined with it as co-defendants in a bill for a discovery and for an injunction against an action brought by the corporation, the injunction may be dissolved upon the coming in of the answer of the corporation, although its officers have not yet answered.<sup>20</sup> So when an injunction is obtained against several defendants restraining them from prosecuting a joint action at law, some of whom answer and obtain a dissolution as to themselves, and the others afterward file their answer but neglect to move to dissolve, those who have already procured the dissolution as to themselves may have the injunction dissolved as to their co-defendants.<sup>21</sup>

§ 1535. **Dissolution refused when equities not denied.** If the equities of the bill are not denied by the answers of defendants, who have no personal knowledge of those equities,\* one of them being a trustee and the others executors of a deceased testator with whom the original transaction was had, it is improper to dissolve the injunction upon their answers.<sup>22</sup>

<sup>18</sup> *Lines v. Spear*, 4 Halst. Ch., 154; *Councill v. Walton*, 4 Ired. Eq., 155.

<sup>19</sup> *Tradesman's Bank v. Merritt*, 1 Paige, 302.

<sup>20</sup> *Glasscott v. Copper Miners Co.*, 11 Sim., 305.

<sup>21</sup> *Macgregor v. Cunningham*, 16 Sim., 365. See also *Joseph v. Doubleday*, 1 Ves. & B., 497.

<sup>22</sup> *Hooker v. Austin*, 41 Miss., 717.

## IV. INJUNCTIONS AGAINST PROCEEDINGS AT LAW.

§ 1536. **Effect of dissolution.**

1537. Dissolution refused before hearing where right is founded in trust.

1538. Dissolution in part.

1539. Credits allowed on judgment.

1540. Effect of defendant declining to answer.

1541. Error to enter decree for amount of judgment on dissolution; costs.

§ 1536. **Effect of dissolution.** The effect of a decree dissolving an injunction against the enforcement of an execution at law is to restore the execution creditor to the same position which he occupied before the granting of the writ, and he may proceed to enforce his execution as if no injunction had been granted.<sup>1</sup> Nor does an appeal from such a decree operate as a stay of execution or revive the injunction, and the creditor is at liberty to proceed with the collection of his execution, notwithstanding such appeal, as if he had never been enjoined.<sup>2</sup>

§ 1537. **Dissolution refused before hearing where right is founded in trust.** While no principle of the law of injunction is better established than that he who has a good defense to an action at law, which he omits or fails to make in the legal forum, can not afterward make such defense the foundation of a bill in equity to enjoin the proceedings at law, yet where an injunction has been granted against such proceedings, it will not be dissolved before the hearing, where complainant's right to relief rests on matters of trust of purely equitable jurisdiction.<sup>3</sup> And where a suit at law has been enjoined in order that the defendant in the action

<sup>1</sup> Duckett v. Dalrymple, 1 Rich. 139; Wood v. Dwight, 7 Johns. Ch., Law, 143. 295.

<sup>2</sup> Garrow v. Carpenter, 4 Stew. & <sup>3</sup> Quackenbush v. Van Riper, P., 336; Hoyt v. Gelston, 13 Johns., Saxt., 476.



might obtain relief and discovery by changing the forum of litigation, if the subject-matter is peculiarly of equitable cognizance, making it proper for a court of equity to retain jurisdiction of the case, the injunction will not be dissolved on the coming in of the answer, denying the equities of the bill.<sup>4</sup>

§ 1538. **Dissolution in part.** Injunctions granted against judgments at law may be dissolved in part and retained until a hearing as to the residue, where the circumstances of the case are such as to clearly require this course in order to promote justice and secure the rights of all parties. Thus, an injunction to a judgment at law, where the answer admits a part of the judgment to have been paid, should not be made perpetual, upon a motion to dissolve, even as to the part paid, but should be continued to the hearing as to the amount admitted to be paid, and dissolved as to the residue.<sup>5</sup> And under the English practice, an injunction restraining several defendants from proceedings at law may be dissolved as against some of them, before all have answered.<sup>6</sup>

§ 1539. **Credits allowed on judgment.** An injunction restraining proceedings under a judgment at law on the ground that the judgment is for an amount larger than that really due, will not be continued on defendant's allowing a credit for the amount of the excess; and the answers showing positively that the balance of the judgment is justly due, the motion to dissolve will be granted.<sup>7</sup> And where proceedings at law are enjoined on the ground of certain credits which have not been allowed, if the defendant admits the credits by his answer and offers to allow them, the injunction will be dissolved as to the balance justly due.<sup>8</sup>

§ 1540. **Effect of defendant declining to answer.** If defendant declines answering the injunction bill, he is regarded, on

<sup>4</sup> *Brown v. Edsall*, 1 Stockt., 256.

<sup>5</sup> *McReynolds v. Harshaw*, 2  
Ired. Eq., 29.

<sup>6</sup> *Lewis v. Smith*, 7 Beav., 470.

<sup>7</sup> *Rodahan v. Driver*, 23 Ga., 352.

<sup>8</sup> *Welch v. Parran*, 2 Gill, 320.

the motion to dissolve, as admitting its allegations. It is therefore error to dissolve an injunction against a judgment at law where the bill contains upon its face sufficient equity to warrant the writ, as where it appears that the judgment has been discharged by proceedings in bankruptcy, and defendant declines to answer.<sup>9</sup>

§ 1541. **Error to enter decree for amount of judgment on dissolution; costs.** In the absence of any statute authorizing such a course, it is error for a court of equity, in dissolving an injunction granted to restrain proceedings under a judgment at law, to enter a decree in favor of the plaintiff at law for the amount of the judgment enjoined, with damages and interest, the proper practice in such case being to dissolve the injunction and dismiss the bill with costs.<sup>10</sup> But when an interlocutory injunction is obtained against judgments at law upon the ground that they are paid, and the injunction is perpetuated upon the hearing as to a judgment which was paid but dissolved as to others not paid, it is a proper exercise of judicial discretion to decree the costs of the litigation against plaintiff in the injunction suit.<sup>11</sup>

<sup>9</sup> Peatross v. McLaughlin, 6 Grat., 64.

<sup>11</sup> Howard v. Bennett, 72 Ill., 297.

<sup>10</sup> Medley v. Pannill's Adm'r, 1 Rob. (Va.), 63.

## V. INJUNCTIONS AFFECTING REALTY.

- § 1542. Diligence exacted of complainant.  
1543. Injunction retained in case of doubt.  
1544. Injunction against judgment for unpaid purchase money.  
1545. The same.  
1546. Illustrations.

§ 1542. **Diligence exacted of complainant.** The general rule exacting diligence from one who seeks the extraordinary aid of equity for the protection of his rights prevails very strongly where an injunction is granted for the protection of property, pending litigation concerning the right or title in dispute. And where a person has received the aid of a court of equity by injunction for the purpose of protecting him in the property in dispute, until the questions at issue shall be determined, he will not be allowed to slumber on his rights, and if he fails to exercise reasonable diligence in advancing his suit, the injunction will be dissolved.<sup>1</sup> Long acquiescence on the part of a complainant in alleged acts of fraud, which constitute the foundation of his injunction, and unreasonable delay in invoking the aid of the court for the protection of his rights will warrant the court in dissolving the injunction. Thus, where an injunction has been obtained on the ground of fraud in certain conveyances, but it appears by the answer that complainants had long been aware of the pretended fraud, and had allowed defendants to proceed

<sup>1</sup> *Schalk v. Schmidt*, 1 McCart., 268. That the rule, however, is not without exception is indicated by the following observations of the court: "There are exceptions to the general rule, but they will be found to consist either of cases where the party enjoined is the mere solicitor, or agent, or tenant

of a party to the suit, having no rights involved in the controversy, or where the right has been already determined. *Cholmondeley v. Clinton*, 19 Vesey, 261; *Attorney-General v. Ancaster*, Dick., 68; *Casamajor v. Strode*, 1 Sim. & St., 381."

without molestation, and to exercise acts of ownership and mortgage the premises, the motion to dissolve will be granted.<sup>2</sup>

§ 1543. **Injunction retained in case of doubt.** The existence of doubt as to whether real estate is properly subject to sale under execution constitutes sufficient ground to warrant a court in retaining an injunction against the sale. Thus, in the case of an injunction against a sheriff's sale of real property under execution, while a serious question is pending and undetermined as to whether the land is really subject to sale in satisfaction of the judgment, a motion to dissolve will not be granted, but the injunction will be continued to the hearing.<sup>3</sup>

§ 1544. **Injunction against judgment for unpaid purchase money.** To authorize a dissolution of an injunction against a judgment for unpaid purchase money of real estate, granted on the ground of defective title, defendants in the injunction suit will be required to exhibit a good title, and complainant, having covenants of warranty from defendants, will not be compelled to accept a conveyance from a third party.<sup>4</sup> And where the defendant seeks a dissolution of such an injunction on the ground that the title is sufficient he may be required to produce his title to the court, in order that it may be satisfied as to its sufficiency.<sup>5</sup> While the purchaser of land may properly enjoin its sale under a deed of trust securing the unpaid purchase money, where the title proves defective, yet when the defect is cured by a conveyance of the outstanding title the injunction will be dissolved, although there are general allegations in the bill of other outstanding title which are not supported by proof.<sup>6</sup> But until an actual tender of a good and sufficient convey-

<sup>2</sup> Trustees v. Gilbert, 1 Beas., 78.

<sup>5</sup> Moredock v. Williams, 1 Overt.,

<sup>3</sup> Van Mater v. Holmes, 2 Halst. 325.

Ch., 575.

<sup>6</sup> Lovell v. Chilton, 2 West Va.,

<sup>4</sup> Moore v. Cooke's Adm'rs, 4 410.  
Hayw. (Tenn.), 84.

ance, the injunction should not be dissolved, and if dissolved before vendor has given such conveyance, it may be reinstated.<sup>7</sup>

§ 1545. **The same.** While the authorities are conflicting as to the right of a purchaser of real estate, with covenants of general warranty, to enjoin a judgment for unpaid purchase money on account of defective title,<sup>8</sup> it would seem that if an injunction may be allowed under such circumstances the judgment will not be perpetually enjoined, but only until the purchaser can prosecute his legal remedy on the covenants of warranty, and if he fails to do this within a reasonable period, the injunction will be dissolved.<sup>9</sup>

§ 1546. **Illustrations.** An injunction granted against a railway company, to restrain it from taking possession of private property without first making payment or tender of damages for the occupancy, will not usually be dissolved on motion, but will be retained until a hearing upon the merits.<sup>10</sup> And where the bill on which an injunction is granted against the prosecution of an action of ejectment charges that the conveyances on which defendant's title rests are fraudulent, the injunction will not necessarily be dissolved on the coming in of the answer, unless it fully and satisfactorily negatives the fraud, and a mere general denial is not sufficient for this purpose.<sup>11</sup>

<sup>7</sup> *Grantland v. Wight*, 2 Munf., 179.      <sup>10</sup> *Ross v. Elizabeth R. Co.*, 1 Green Ch., 422.

<sup>8</sup> See § 382, *ante*, *et seq.*

<sup>11</sup> *Roberts v. Anderson*, 2 Johns.

<sup>9</sup> *Swain v. Burnley*, 1 Mo. (2nd edition), 286.      Ch., 202.

## CHAPTER XXXI.

### OF THE PARTIES TO THE ACTION.

- § 1547. General rule as to joinder of parties.
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- 1564a. Action against public official; joinder of successor in office.
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§ 1547. **General rule as to joinder of parties.** The general principles deducible from the authorities as to the joinder of parties complainant and defendant, in proceedings in courts of equity, apply to the case of an injunction bill, and by these principles the court is guided in determining whether proper parties have been brought before it, for or against whom relief by injunction is asked. It may be premised, generally, that the jurisdiction will be exercised only in behalf of parties interested in the transaction or subject-matter of the proceedings which it is sought to enjoin, and that one who has no personal interest in the matter is not entitled to the relief, even though he may have been a party to the proceedings at law which he seeks to

restrain.<sup>1</sup> Nor will equity interpose by injunction for the protection of one who seeks relief indirectly through the equities of other parties, on which they themselves do not insist.<sup>2</sup>

§ 1548. **Parties not before court.** As a general rule, an injunction will not be allowed against a party not a defendant to the bill, or not properly brought before the court.<sup>3</sup> If, however, the court is in full possession of a cause, it may, simply upon motion in the action, restrain parties from proceeding at law with respect to the same matter.<sup>4</sup> And a purchaser under a decree in equity may be enjoined from acting contrary to the decree, although not a party to the proceedings.<sup>5</sup> And where defendants have been enjoined from diverting the waters of a stream, a subsequent grantee of the defendant's interest in the stream is bound by the injunction even though he was not a party to the suit.<sup>6</sup>

§ 1549. **Illustrations.** Where the effect of an injunction would be to cause material injury to the rights of persons not before the court, the relief will rarely be granted unless in cases of very great necessity.<sup>7</sup> But upon an application for an injunction the court may proceed against such defendants as have

<sup>1</sup> *Wynne v. Newborough*, 1 Ves. Jr., 164; *Hunter v. Nockolds*, 15 L. J. Ch., 320.

<sup>2</sup> *Roberts v. Bozon*, 3 L. J. Ch., 113.

<sup>3</sup> *Fellows v. Fellows*, 4 Johns. Ch., 25; *Schalk v. Schmidt*, 1 McCart., 268; *Iveson v. Harris*, 7 Ves., 256; *State of Kansas v. Anderson*, 5 Kan., 90; *Scott v. Donald*, 165 U. S., 107, 17 Sup. Ct. Rep., 262, and cases cited.

<sup>4</sup> *Harrison v. Gurney*, 2 Jac. & W., 563; *Wedderburn v. Wedderburn*, 2 Beav., 208.

<sup>5</sup> *Casamajor v. Strode*, 1 Sim. & St., 381.

<sup>6</sup> *Ahlers v. Thomas*, 24 Nev., 407, 56 Pac., 93, 77 Am. St. Rep., 820.

<sup>7</sup> *Hartlepool Company v. West Hartlepool Company*, 12 L. T. N. S., 366. And see *Philadelphia v. River Front R. Co.*, 133 Pa. St., 134, 19 Atl., 356. In *Consolidated Water Co. v. City of San Diego*, 35 C. C. A., 631, 93 Fed., 849, it was held in a suit brought by the mortgagee of the property of a water company to enjoin the enforcement of an ordinance prescribing water rates, that the mortgagor water company was a necessary party.

been served with process, although others are not yet served.<sup>8</sup> And if the act complained of affects a common right of several persons whose interests are, in a legal point of view, substantially the same, proceedings for an injunction may be instituted by one or more of them in behalf of the others.<sup>9</sup> But the action will not lie against different persons for separate infringements or violations of one and the same right.<sup>10</sup>

§ 1550. **Injunctions against proceedings at law.** It may be laid down as a general proposition, that a court of equity will not enjoin proceedings in an action at law in behalf of one not a party to the suit which it is sought to enjoin.<sup>11</sup> The converse of this proposition holds equally true, and an injunction will not be granted in aid of a suit at law against one who is not a party to the action in the legal forum.<sup>12</sup> Nor will equity grant relief against an action at law where it satisfactorily appears that the proceedings were undertaken merely at the instigation of another person.<sup>13</sup>

§ 1551. **Officers of court, when necessary parties.** Where proceedings under a judgment are enjoined, or an injunction is allowed against a sale of lands under judicial process, it is not proper to join as defendants in the bill merely ministerial officers of the court, such as the clerk who issues process, or the sheriff who serves it, they having no interest in the subject-matter in controversy. The injunction operating directly upon the parties to the judgment or proceeding enjoined, is regarded as being operative through them upon all officers of the law acting in consequence of the judgment.<sup>14</sup> An exception is, how-

<sup>8</sup> *Brown v. Pacific Company*, 5 Blatch., 525.

<sup>9</sup> *Mozley v. Alston*, 1 Ph., 790.

<sup>10</sup> *Dilly v. Doig*, 2 Ves. Jr., 486; *Pollock v. Lester*, 11 Hare, 274.

<sup>11</sup> *New York v. Connecticut*, 4 Dall., 1.

<sup>12</sup> *Chamblin v. Slichter*, 12 Minn., 276.

<sup>13</sup> *Pentney v. Lynn Paving Commissioners*, 13 W. R., 983.

<sup>14</sup> *Edney v. King*, 4 Ired. Eq., 465; *Lackay v. Curtis*, 6 Ired. Eq., 199; *Olin v. Hungerford*, 10 Ohio, 268; *Artman v. Giles*, 155 Pa. St., 409, 26 Atl., 668. But see, *contra*, *Burpee v. Smith*, Walk. (Mich.), 327.



ever, allowed to the rule in cases of fraud, and where there is a fraudulent combination between the officer having the execution in his possession and the judgment creditor, or where the officer is charged with being an active agent in the commission of the fraud, on account of which the judgment is impeached, such officer should be joined as a proper party to the action.<sup>15</sup>

§ 1552. **Injunctions against judgments at law.** Where an injunction is asked against a judgment at law, all the plaintiffs who have obtained the judgment must be made defendants in the injunction suit.<sup>16</sup> But while it is generally the case that judgments may be enjoined only on the application of those who were parties to the proceedings at law, there may be circumstances which require a departure from the rule. Thus, where a judgment has been fraudulently recovered against an agent, and his principals, though not parties to the proceedings, are bound to reimburse him on account thereof, they are proper parties to ask relief in equity against the judgment.<sup>17</sup> But where an injunction is sought restraining a judgment at law in a United States court which had jurisdiction over all the parties to the action at law, the introduction of new parties in the injunction bill, over whom the court has no jurisdiction, will prevent it from granting the relief prayed. If, however, there be sufficient equity in the case, a stay of proceedings may be granted until relief can be had in the state courts.<sup>18</sup>

§ 1553. **Test in cases of public easements.** Questions of great nicety have sometimes arisen in determining who are proper parties to seek relief by injunction against the violation of rights or easements of a public nature. The true test to be applied in all such cases is to determine whether the persons asking the relief are merely volunteers, or whether they are injured in their individual rights. And while in the latter case

<sup>15</sup> *Olin v. Hungerford*, 10 Ohio, 268; *Allen v. Medill*, 14 Ohio, 445. <sup>17</sup> *Webster v. Skipwith*, 26 Miss., 341.

<sup>16</sup> *Berry v. Berry's Heirs*, 3 Monr., 263. <sup>18</sup> *Dunn v. Clarke*, 8 Pet., 1.

the relief will generally be granted, in the former it will be withheld.<sup>19</sup> Thus, the owner of adjacent lots may enjoin the appropriation to private purposes or the sale of a square dedicated to the use of the public. The complainant in such a case, being one of the inhabitants of the town, and owning property contiguous to the square, is not a mere volunteer, assuming to protect the rights of others, but is entitled to the aid of equity for the protection of his own interests.<sup>20</sup> But, on the other hand, the owners of lots around a square which has been conveyed to a county for the use of public buildings have not such an individual interest in the ground as will authorize a court of equity in enjoining, on their application, county commissioners from leasing portions of the ground to private persons, reserving the rent to the county. Such complainants are to be considered in the light of mere volunteers, who sustain no injury to their individual rights, and are not entitled to protection in equity.<sup>21</sup>

§ 1554. **Cases affecting the public.** When the right involved is purely of a public nature and the grievance which it is sought to enjoin is one which affects the public at large, the proceeding is usually instituted both in England and in this country by the attorney-general in behalf of the people, sometimes proceeding in his own name or that of the people absolutely, and sometimes upon the relation of a citizen.<sup>22</sup> And in actions to enjoin the erection or continuance of public nuisances

<sup>19</sup> *Smith v. Heuston*, 6 Ohio, 101; *Brown v. Manning*, 6 Ohio, 298. In illustration of the same general principle, see *Putnam v. Valentine*, 5 Ohio, 187.

<sup>20</sup> *Brown v. Manning*, 6 Ohio 298; *Cummings v. City of St. Louis*, 90 Mo., 259, 2 S. W., 130.

<sup>21</sup> *Smith v. Heuston*, 6 Ohio, 101.

<sup>22</sup> *Attorney-General v. Compton*,

1 Y. & C. C. C., 417; *Attorney-General v. Lea's Heirs*, 3 Ired. Eq., 302; *Same v. Perkins*, 2 Dev. Eq., 38; *Attorney-General v. County Council of Mayo*, (1902) 1 L. R. Ir., 13; *Attorney-General v. Esher L. Co.*, (1901) 2 Ch., 647. And see Chapter XIII, Subdivision II, of Public Nuisances.

this course is generally pursued.<sup>23</sup> But a bill to enjoin a purely public nuisance can not be maintained solely upon the relation of a private individual and without any action upon the part of the proper public officers, although the proceedings are carried on in the name of the attorney-general upon behalf of the state.<sup>24</sup> And it is held that the attorney-general can not maintain an action in the name of the people to enjoin the officers of a municipal corporation from issuing its bonds in aid of a subscription to a railway, the state as such having no interest in such litigation and no right to interfere therein.<sup>25</sup> But where state funds are about to be diverted to the purchase of land for the erection of a public building, under a statute for that purpose which violates a constitutional provision that such buildings shall be located at the seat of government, the state may maintain an information in equity filed upon the relation of its law officer to enjoin the payment of a warrant issued for the purchase of such land, although no special or pecuniary injury will result from such diversion.<sup>26</sup> But an injunction will not be granted in such case at the suit of an individual taxpayer,<sup>27</sup> nor upon a bill filed in the name of the state upon his relation,<sup>28</sup> unless he shows that he will suffer special pecuniary injury resulting from an increase in the burden of his taxation.

§ 1555. **Public nuisances.** A municipal corporation, being, in its governmental capacity and within the limits of its powers,

<sup>23</sup> *People v. Vanderbilt*, 28 N. Y., 396; *Same v. Same*, 38 Barb., 282; *Attorney-General v. Richards*, 2 Anst., 602; *State v. Dayton & S. E. R. Co.*, 36 Ohio St., 434.

<sup>24</sup> *State v. City of Milwaukee*, 102 Wis., 509, 78 N. W., 756.

<sup>25</sup> *People v. Miner*, 2 Lans., 396. And see this case for a learned and exhaustive review of the authorities upon the right of the attorney-general to interfere by injunction against corporations.

<sup>26</sup> *State v. Metschan*, 32 Ore., 372, 46 Pac., 791, 53 Pac., 1071, 41 L. R. A., 692. And see this case as to the necessity of making the holder of the warrant a party to the suit.

<sup>27</sup> *Sherman v. Bellows*, 24 Ore., 553, 34 Pac., 549.

<sup>28</sup> *State v. Pennoyer*, 26 Ore., 205, 37 Pac., 906, 41 Pac., 1104, 25 L. R. A., 862; *State v. Lord*, 28 Ore., 498, 43 Pac., 471, 31 L. R. A., 473.

the agent or representative of the sovereign power of the state, may, where it is given authority and jurisdiction under the law of its organization over the subject-matter affected by a public nuisance, maintain a bill, either in its corporate name or in the name of its corporate authorities, for the purpose of enjoining and abating a public nuisance.<sup>29</sup> Thus, a village, having the power to remove and abate any nuisance injurious to the public health and to pass regulations necessary for the preservation of the public health, may enjoin the maintenance of a dam which, when the water is drawn off, causes injury to health in the neighborhood arising from malaria which results from decaying vegetable matter.<sup>30</sup> So a municipal corporation which is entrusted with the care and control of streets and highways within its boundaries and the removal of obstructions therefrom, may maintain a bill to enjoin a public nuisance consisting of the unlawful obstruction of such highway.<sup>31</sup> So the erection of buildings upon a public square which has been dedicated as such to the use of the inhabitants of a town constitutes a public nuisance, which may be enjoined by the corporate authorities.<sup>32</sup> And private persons, specially injured by a nuisance of such a

<sup>29</sup> *Village of Pine City v. Munch*, 42 Minn., 342, 44 N. W., 197, 6 L. R. A., 763; *Township of Hutchinson v. Filk*, 44 Minn., 536, 47 N. W., 255; *City of Red Wing v. Gup-til*, 72 Minn., 259, 75 N. W., 234, 41 L. R. A., 321, 71 Am. St. Rep., 485; *Hygeia M. S. Co. v. Village of Waukesha*, 83 Wis., 475, 53 N. W., 675; *Town of Neshkoro v. Nest*, 85 Wis., 126, 55 N. W., 176; *Metropolitan City R. Co. v. City of Chicago*, 96 Ill., 620; *Chicago, B. & Q. R. Co. v. City of Quincy*, 136 Ill., 489, 27 N. E., 232; *Trustees v. Cowen*, 4 Paige, 510. And see *Mayor v. Bolt*, 5 Ves., 129. But see, *contra*, *Inhabitants of Needham v. N. Y. & N. E. R. R. Co.*,

152 Mass., 61, 25 N. E., 20; *Inhabitants of Winthrop v. New Eng-land C. Co.*, 180 Mass., 464, 62 N. E., 969.

<sup>30</sup> *Village of Pine City v. Munch*, 4 Minn., 342, 44 N. W., 197, 6 L. R. A., 763.

<sup>31</sup> *Township of Hutchinson v. Filk*, 44 Minn., 536, 47 N. W., 255; *Hygeia M. S. Co. v. Village of Waukesha*, 83 Wis., 475, 53 N. W., 675; *Town of Neshkoro v. Nest*, 85 Wis., 126, 55 N. W., 176; *Metropolitan City R. Co. v. City of Chi-cago*, 96 Ill., 620; *Chicago, B. & Q. R. Co. v. City of Quincy*, 136 Ill., 489, 27 N. E., 232.

<sup>32</sup> *Trustees v. Cowen*, 4 Paige, 510.

nature, may join with the corporate authorities in filing the bill.<sup>33</sup> So the liability of a town to damages which may result from the obstruction of a public highway renders the town a proper plaintiff in an action to enjoin the obstruction.<sup>34</sup> Where, however, the bill is filed in behalf of private citizens to restrain a public nuisance, they must show some special and peculiar injury sustained by themselves, independent of and distinct from the common and general injury shared by the public alike, in default of which equity will not interfere.<sup>35</sup> And the health officer of a town, being a mere agent or executive officer of the board of health, is not a proper party to maintain a bill against a city to enjoin a public nuisance.<sup>36</sup> And the use of a public highway by a street railway company under an ordinance from a city, will not be enjoined upon the alleged ground that it is a public nuisance even upon an information filed by the attorney-general, where it appears from the record that such information was filed solely at the instigation of a rival street railway company and not in the interest of the general public.<sup>37</sup>

§ 1556. **General test; railway-aid tax; resolution by common council.** The simplest and most generally accepted test in determining whether one is a proper party plaintiff to a bill for an injunction is whether he possesses a legal or equitable interest in the subject-matter of the controversy. Applying

<sup>33</sup> *Trustees v. Cowen*, 4 Paige, 510.

<sup>34</sup> *Town of Burlington v. Schwarzman*, 52 Conn., 181; *Hygeia M. S. Co. v. Village of Waukesha*, 83 Wis., 475, 53 N. W., 675.

<sup>35</sup> *Bigelow v. Hartford Bridge Co.*, 14 Conn., 565; *O'Brien v. Norwich & W. R. Co.*, 17 Conn., 372; *Frink v. Lawrence*, 20 Conn., 117; *Corning v. Lowerre*, 6 Johns. Ch., 439; *Doolittle v. Supervisors*, 18 N. Y., 160; *Allen v. Board*, 1 Beas.,

68; *Hinchman v. Paterson H. R. Co.*, 2 C. E. Green, 75; *Mechling v. Kittanning Bridge Co.*, 1 Grant's Cases, 416; *Beveridge v. Lacey*, 3 Rand., 63; *Walker v. Shepardson*, 2 Wis., 384; *Barnes v. Racine*, 4 Wis., 454; *Williams v. Smith*, 22 Wis., 594. And see, *ante*, § 762.

<sup>36</sup> *Buckstaff v. City of Oshkosh*, 92 Wis., 520, 66 N. W., 707.

<sup>37</sup> *People v. General Electric R. Co.*, 172 Ill., 129, 50 N. E., 158.

this test, it has been held that a state was not a proper party to a bill to restrain a county court from issuing bonds and collecting a tax in aid of a railway, the state having no interest, either legal or equitable, in the subject in dispute.<sup>38</sup> And where an action is brought by the attorney-general, in the name of the people, to restrain the execution of a resolution of the common council of a municipal corporation, giving a contract for certain labor to persons who were not the lowest bidders, as required by law, neither the contractors nor the bidders need be made parties.<sup>39</sup>

§ 1557. **Injunction against tax.** Taxpayers and residents of a school district are proper parties to institute proceedings for an injunction against the collection of a tax for the payment of judgments obtained through fraud and collusion against the school district.<sup>40</sup> It is to be observed, however, the tax being upon the individual property of each taxpayer, that the injury, if any, is to his individual rights, and does not affect any common interest; it is therefore requisite that each property holder desiring relief against the tax shall bring his separate action, and no one of the number can bring the action in behalf of all.<sup>41</sup> Nor can different owners of real estate in severalty unite in an action to enjoin an assessment upon their property, the cause of action in such case being several and not joint.<sup>42</sup>

§ 1558. **Religious bodies.** Where relief by injunction is sought for the protection of the rights of churches and religious bodies, the action is usually brought in the name of the trustees.<sup>43</sup> Thus, the trustees of a church are proper parties

<sup>38</sup> *State v. Parkville & G. R. Co.*, 32 Mo., 496. As to the necessity of a railway company being made a party to an action to enjoin the issuing of municipal bonds in aid of such company, see *Township of Dixon v. Board of Commissioners*, 25 Kan., 519.

<sup>39</sup> *People v. Mayor*, 32 Barb., 35.

<sup>40</sup> *Newcomb v. Horton*, 18 Wis., 566. And see *Williams v. Peinny*, 25 Iowa, 436.

<sup>41</sup> *Newcomb v. Horton*, 18 Wis., 566.

<sup>42</sup> *Jones v. Cardwell*, 98 Ind., 331.

<sup>43</sup> *Trustees v. Hoessli*, 13 Wis., 348; *Beatty v. Kurtz*, 2 Pet., 566.

complainant to a bill for an injunction against pretended trustees, to restrain them from meddling with the affairs of the church, and the action need not be brought in the name of the state.<sup>44</sup> So the trustees of a voluntary religious association may, in behalf of their church, enjoin the violation of a burial ground dedicated to the use of the church by the owner of the soil.<sup>45</sup> And under such circumstances a court of equity will grant relief even against the holder of the legal title.<sup>46</sup>

§ 1559. **Principal and agent.** As between principal and agent, relief by injunction is sometimes necessary to prevent the agent from a wrongful conversion or misappropriation of his principal's property. Thus, where certain specific chattels have been delivered to a person to be held by him as agent, and in violation of his duty to his principal he contracts for the sale of the articles to a third person, the principal is entitled to the aid of equity to prevent the agent from parting with or disposing of the goods.<sup>47</sup> So an injunction has been allowed to restrain the transfer of stock in an incorporated company standing in the name of a steward, upon a strong showing that it was purchased from proceeds of his master's or principal's property.<sup>48</sup>

§ 1560. **Taxpayers as plaintiffs.** A taxpayer may maintain an action in his own name to prevent the commission of an unlawful act by the authorities of a county, the effect of which would be to increase his burden of taxation. And such a case is properly distinguished from that of a public nuisance, where a private citizen must show some special injury peculiar to himself to entitle him to maintain an action.<sup>49</sup> Where, however, taxpayers of a county seek to enjoin the county authorities from subscribing to the capital stock of a railway company,

<sup>44</sup> *Trustees v. Hoessli*, 13 Wis., 348.

<sup>45</sup> *Beatty v. Kurtz*, 2 Pet., 566.

<sup>46</sup> *Id.*

<sup>47</sup> *Wood v. Rowcliffe*, 3 Hare, 304.

<sup>48</sup> *Chedworth v. Edwards*, 8 Ves.,

<sup>46</sup>. But the relief was refused as to money deposited in bank to the account of the steward.

<sup>49</sup> *Commissioners of Clay Co. v. Markle*, 46 Ind., 96. And see, *ante*, § 1237.

and from delivering bonds of the county to the company, and from levying any tax in payment of such bonds, the action should be brought in behalf of themselves and all others similarly situated, and it may be dismissed if brought by plaintiffs alone, they having no other interest in the question to be determined than that common to all taxpayers. But in such case the dismissal should be without prejudice, leaving the parties to adjust their rights in another action.<sup>50</sup> And a taxpayer can not enjoin the enforcement of a municipal ordinance alleged to be invalid because granting an exclusive franchise, where the plaintiff suffers no injury different in kind from that suffered by the public at large.<sup>51</sup>

§ 1561. **Owner of state bond; trustee in corporate trust deed.** The owner of a state bond, the value of which is being depreciated and its security diminished by the improper diversion of the public funds by a state treasurer, may maintain an action to enjoin such treasurer; since he has a direct and peculiar interest in the preservation and lawful administration of the funds of the state, aside from his general interest as a citizen.<sup>52</sup> And a trustee under a trust deed executed by a corporation covering all the corporate property and franchises is a proper party plaintiff to enjoin the unlawful interference with such property upon the part of the officials of a municipality.<sup>53</sup>

§ 1562. **Agent of foreign government.** An injunction will not be granted against an agent of a foreign government attached to the embassy of that government and acting under the direction of its foreign ambassador. And in such case, sufficient ground for refusing the relief is found in the fact that the court would be powerless to enforce its injunction against

<sup>50</sup> Packard v. Board of County Commissioners, 2 Col., 338.

<sup>52</sup> Graham v. Horton, 6 Kan., 343.

<sup>53</sup> Old Colony Trust Co. v. City

<sup>51</sup> Patton v. Chattanooga, 108 Tenn., 197, 65 S. W., 414.

of Wichita, 123 Fed., 762.



the representative of a foreign government, either by arrest of the person or by seizure of property.<sup>54</sup>

§ 1563. **Improper joinder of plaintiffs.** As regards the effect of an improper joinder of parties plaintiff in a suit for an injunction, it is held that when the bill is multifarious because of joining plaintiffs whose title and right to relief are wholly distinct and disconnected, the injunction may be properly refused upon that ground alone.<sup>55</sup>

§ 1564. **Omission of necessary defendant; non-resident defendant.** But the fact that a necessary party defendant has been omitted from a bill for an injunction will not of itself justify the court in granting a dissolution, when sufficient ground for the injunction is shown, the party omitted being a corporation all of whose members are joined as parties, and when it would be a matter of course to amend by joining the party omitted.<sup>56</sup> And on a bill to enjoin the diversion of water by tortfeasors, it is no objection to granting the relief that one of the defendants resides beyond the jurisdiction of the court and has not been served with process; and the suit may be dismissed as to such defendant and proceed as to the others.<sup>57</sup> \*

§ 1564 a. **Action against public official; joinder of successor in office.** Where an injunction suit is brought against a public officer in his official capacity, as against a county treasurer to restrain the collection of taxes, and during the pendency of the action his term of office expires and his successor is elected and qualifies, while it is the better practice to bring the latter into court by amendment, yet since the suit is to be regarded as against the office and its incumbent whoever he may be, it is not necessary that the successor should be brought in, and the failure to substitute the new official does not have the effect of

<sup>54</sup> *Service v. Castaneda*, 2 Coll.,  
56.

<sup>55</sup> *Moore v. Hill*, 59 Ga., 760.

<sup>56</sup> *Morgan v. Rose*, 7 C. E. Green,  
583.

<sup>57</sup> *Cole Co. v. Virginia Co.*, 1  
Sawy., 470.

abating the action nor does it constitute ground for its dismissal upon motion.<sup>58</sup>

§ 1564 *b*. **Amendment to bring in necessary parties; when denied.** Where it appears to the court that there are persons whose interests would be injuriously affected by the decree of the court and they are not made parties to the suit, while ordinarily leave should be granted to bring in such parties by amendment, yet where it appears that they are beyond the jurisdiction of the court and could therefore not be reached by process, or that to bring them in would defeat the jurisdiction of the court, leave to amend should be denied and the bill is properly dismissed.<sup>59</sup>

<sup>58</sup> *Pittsburg, F. W. & C. R. Co. v. Martin*, 53 Ohio St., 386, 41 N. E., 690.

<sup>59</sup> *Minnesota v. Northern Securities Co.*, 184 U. S., 199, 22 Sup. Ct. Rep., 308.

## CHAPTER XXXII.

### OF PRACTICE.

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#### I. PRACTICE IN GRANTING INJUNCTIONS.

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§ 1565. **Practice largely regulated by statute.** Questions of practice connected with the granting and dissolving of injunctions are so largely regulated by statute and local usage in the different states, that but few rules of general application can be deduced from the decided cases. The most that can be attempted in this direction is to present such leading principles as are believed to be generally recognized by courts of equity in administering relief by injunction, leaving the practitioner to be guided by local rules as to the details of practice.

§ 1566. **Injunctions granted on bill, or on motion.** Interlocutory injunctions are generally granted upon the filing of a bill, properly verified, in which complainant sets forth the equities on which he bases his right to relief, the bill concluding with a prayer for an injunction. Where, however, a court of equity is already in possession of a cause, having jurisdiction both of the subject-matter in controversy and of the parties, it may enforce obedience to its mandates by an injunction issued merely upon a petition in the cause, and without the filing of a bill.<sup>1</sup> Indeed, a court of equity will not ordinarily entertain a new and independent action for an injunction in a matter already pending before the court, and in which plaintiff might obtain full relief by motion.<sup>2</sup> And an injunction may be granted on motion, and without a new action, to restrain a tenant under a receiver of the court from removing articles from the demised premises; in such case, the court proceeds upon the ground that the tenant having entered into a contract with the court itself, through its receiver, a new action is unnecessary.<sup>3</sup>

§ 1567. **Verification of bill.** The proper verification of the bill is a matter of importance, since an injunction is seldom

<sup>1</sup> In the matter of Hemiup, 2 Paige, 316.

<sup>2</sup> Faison v. McIlwaine, 72 N. C., 312.

<sup>3</sup> Walton v. Johnson, 15 Sim., 352. And under the practice of

the Irish Court of Chancery, the court may, in a matter of lunacy, enjoin the commission of waste merely upon motion and with no cause pending. *In re Chinnerys*, 6 Ir. Eq., 469.

allowed upon other than a sworn bill. Nor will it suffice that the material facts constituting the equity on which the injunction is sought are verified by complainant upon information and belief, but they should be positively sworn to.<sup>4</sup> So when an injunction is sought upon the ground of fraud it is not sufficient that the allegations of fraud should be upon information and belief, but they should be positive and founded upon plaintiff's own knowledge, or that of some person conversant with the facts.<sup>5</sup> And where, upon an *ex parte* application for an interlocutory injunction, complainant states the facts on which his equities rest upon information and belief, he should present affidavits of their truth from the person of whom his knowledge is obtained and who can swear positively to the facts.<sup>6</sup> An exception, however, is recognized in the case of an injunction in aid of a creditor's bill against the judgment debtor alone, no third parties being joined as defendants, and in such case it is sufficient if complainant swears upon information and belief as to the recovery of the judgment and return of execution *nulla bona*.<sup>7</sup> The exception rests upon the fact that the judgment and execution are matters of record, to which defendants are parties, and complainant is not required to swear positively as to the existence of the records.<sup>8</sup> So, too, the verification of an injunction bill in aid of a creditor's suit may be made by the attorney who has conducted the proceedings at law.<sup>9</sup> And an injunction bill may be verified by an agent, if he is conversant with the facts.<sup>10</sup> But where the

<sup>4</sup> *Campbell v. Morrison*, 7 Paige, 157; *Crocker v. Baker*, 3 Ab. Pr., 182; *Reboul's Heirs v. Behrens*, 5 La., 79; *Catlett v. McDonald*, 13 La., 44; *Shonk v. Knight*, 12 West Va., 667; *Gaertner v. City of Fond du Lac*, 34 Wis., 497. For the practice under the Montana Code, see *Butte & Boston C. M. Co. v. M. O. P. Co.*, 24 Mont., 125, 60 Pac., 1039.

<sup>5</sup> *Brooks v. O'Hara*, 8 Fed., 529.

<sup>6</sup> *Campbell v. Morrison*, 7 Paige, 157; *Bank of Orleans v. Skinner*, 9 Paige, 305; *Youngblood v. Schamp*, 2 McCart., 42.

<sup>7</sup> *Hamersley v. Wyckoff*, 8 Paige, 72; *Sizer v. Miller*, 9 Paige, 605.

<sup>8</sup> *Id.*

<sup>9</sup> *Sizer v. Miller*, 9 Paige, 605.

<sup>10</sup> *Mayor v. Finney*, 54 Ga., 317; *Long v. Kasebeer*, 28 Kan., 226.

bill is by a married woman and the facts relied upon are such as would ordinarily rest only in her own knowledge, a verification by her next friend is insufficient.<sup>11</sup> But a formal verification of the bill is not required as the basis for an interlocutory injunction, if proper affidavits are filed in support of it upon the interlocutory application.<sup>12</sup>

§ 1568. **Verification of bill by corporation.** Where an injunction is sought in behalf of a corporation, the bill is usually verified by some officer of the corporation conversant with the facts. It may, however, be verified by an attorney or other agent, without the oath of any of the regular officers of the corporation, when such officers are less acquainted with the facts constituting the foundation for the injunction than the agent or attorney.<sup>13</sup> But an injunction will not be granted upon a bill verified by an attorney of the plaintiff, who swears to no personal knowledge of the facts, no reason being given why the verification is not made by some one personally conversant with the facts.<sup>14</sup>

§ 1569. **Requisites of verification; objection must be made in apt time; not considered on appeal from final decree.** As to the nature and requisites of the verification itself, it is held that the affidavit should be such as to submit the party to the penalties of perjury if its allegations prove untrue. Nor will it suffice that the affidavit alleges that the material allegations of the bill are true on knowledge and belief,<sup>15</sup> or that the party verifying swears positively to the truth of the material averments, since it is still left uncertain what are the material

<sup>11</sup> *Smith v. Republic Life Insurance Co.*, 2 Tenn. Ch., 631. See also *Ballard v. Eckman*, 20 Fla., 661.

<sup>12</sup> *Meinhard v. Youngblood*, 37 S. C., 231, 15 S. E., 950, 16 S. E., 771. And see this case as to the granting of an injunction without notice after answer filed, under § 242 of the Code; also as to the neces-

sity of filing a bond as a condition to the granting of an injunction, under § 243 of the Code.

<sup>13</sup> *Bank of Orleans v. Skinner*, 9 Paige, 305.

<sup>14</sup> *Manistique L. Co. v. Lovejoy*, 55 Mich., 189.

<sup>15</sup> *Reboul's Heirs v. Behrens*, 5 La., 79; *Catlett v. McDonald*, 13 La., 44.

facts.<sup>16</sup> Neither is it sufficient that the affiant swears that the allegations of the bill are true which render an injunction necessary, or which form the basis of the injunction, since such verification is open to the same objection of uncertainty.<sup>17</sup> And a verification by plaintiff's attorney, which fails to show that he knows any of the facts alleged of his own knowledge, will not suffice.<sup>18</sup> So when the bill is verified by plaintiff's attorney, who only avers that the facts are true so far as the same have come directly to his knowledge, and all else he believes to be true, without averring what facts are directly within his knowledge, it is insufficient.<sup>19</sup> And while it is no objection to the verification that it is made by an attorney or other person in behalf of plaintiff, yet if the affidavit states that the facts alleged in the bill are true so far as known to affiant or stated upon his own knowledge, and that so far as stated upon information he believes them to be true, without stating or designating any facts known to affiant, the verification will be held insufficient.<sup>20</sup> And a bill which is sworn to upon the basis of the knowledge, information and belief of affiant, but is unaccompanied by affidavits from those from whom such knowledge, information and belief of affiant are derived, is not sufficient as the basis for a preliminary injunction, nor is the defect cured by the admission in the answer of material facts alleged in the bill, where there are other material facts alleged which are not admitted.<sup>21</sup> So where the affidavit made by one not a party to the cause merely states

<sup>16</sup> *Sauvinet v. Poupono*, 14 La., 87.

<sup>17</sup> *Hebert v. Joly*, 5 La., 50; *Ricard's Heirs v. Hiriart*, Ib., 244; *Elder v. City of New Orleans*, 31 La. An., 500.

<sup>18</sup> *Hone v. Moody*, 59 Ga., 731; *Landes v. Globe P. M. Co.*, 73 Ga., 176; *Manistique L. Co. v. Lovejoy*, 55 Mich., 189, 20 N. W., 899; *Fow-*

*ble v. Kemp*, 92 Md., 630, 48 Atl., 379.

<sup>19</sup> *Bowes v. Hoeg*, 15 Fla., 403.

<sup>20</sup> *Pullen v. Baker*, 41 Tex., 419; *Chesapeake & O. R. Co. v. Huse*, 5 West Va., 579. And see the latter case as to the requisites of verification under the code of West Virginia.

<sup>21</sup> *Ruge v. A. O. C. & F. Co.*, 25 Fla., 656, 6 So., 489.

that the bill is true according to the best of affiant's knowledge and belief, it will be held insufficient unless it informs the court as to the source of the information or states what knowledge affiant has upon the subject.<sup>22</sup> And where the affidavit is sworn to by the attorney or agent of the plaintiff, it will not suffice unless it states that the facts are within the personal knowledge of the affiant.<sup>23</sup> But it is no objection to the verification that it is made by some one other than the plaintiff if it is expressly and explicitly stated that the matters are within the personal knowledge of the affiant.<sup>24</sup> And when the affidavit verifying the bill states that its facts and allegations are true, without averring explicitly that they are all true, it will be held sufficient.<sup>25</sup> And while a bill seeking an interlocutory injunction should be verified by affidavit, if the relief sought is only a final injunction and no temporary injunction is sought, the bill need not be under oath.<sup>26</sup> So the insufficiency of the verification, as the basis for a preliminary injunction, can not be raised upon an appeal from a final decree granting a perpetual injunction, and in such case it is immaterial that the bill was improperly verified or that a preliminary injunction was improperly granted upon such verification.<sup>27</sup> So, although a preliminary injunction has been improperly granted because of the lack of verification to the bill, yet if it has been allowed to stand until the hearing, and the evidence discloses sufficient equity to support it, it should

<sup>22</sup> *Moffat v. Calvert County*, 97 Md., 266, 54 Atl., 960; *Bowie v. Smith*, 97 Md., 326, 35 Atl., 625.

<sup>23</sup> *Fowble v. Kemp*, 92 Md., 630, 48 Atl., 379.

<sup>24</sup> *My Maryland Lodge v. Adt*, (Md. 1905) 59 Atl., 721.

<sup>25</sup> *Lewis v. Winston*, 26 La. An., 707.

<sup>26</sup> *Sand Creek Turnpike Co. v. Robbins*, 41 Ind., 79; *Rich v. Des-sar*, 50 Ind., 309; *Champ v. Ken-*

*drick*, 130 Ind., 549, 30 N. E., 787; *Fisher v. Patton*, 134 Mo., 32, 34 S. W., 1096; *United States Mitis Co. v. Detroit S. & S. Co.*, 59 C. C. A., 589, 122 Fed., 863. See also *Commissioners of Clay Co. v. Markle*, 46 Ind., 96.

<sup>27</sup> *Rothenburg v. Vierath*, 87 Md., 634, 40 Atl., 655; *Hopkins Amusement Co. v. Frohman*, 202 Ill., 541, 67 N. E., 391; *Champ v. Kendrick*, 130 Ind., 549, 30 N. E., 787.



be perpetuated.<sup>28</sup> And an objection for want of proper verification must be taken in apt time, and if raised after a hearing upon the merits, it comes too late.<sup>29</sup>

§ 1570. **Information by attorney-general.** The jurisdiction of equity by injunction is sometimes invoked upon an information filed by the attorney-general of the state. In such cases the information of the attorney-general, acting *ex officio* and under the sanction of his oath of office, is equivalent to a bill in chancery verified upon information and belief. Like such a bill, it may in proper cases call for an answer under oath; but, as in such a bill, an injunction will not ordinarily be granted unless the information is supported by positive affidavit, until defendant has had an opportunity to contradict it under oath and has failed so to do.<sup>30</sup>

§ 1571. **When granted on information and belief.** The fact that many of the material allegations upon which an injunction is sought are stated upon information and belief will not prevent the granting of the relief when defendant, by demurring to the bill, admits the truth of its allegations, and when the injunction is issued after notice and with no denial upon the part of defendant of the truth of the bill.<sup>31</sup> So where certain facts are entirely within the knowledge of the defendant, and discovery is sought by the bill, it is no objection that such facts are alleged upon information and belief.<sup>32</sup>

§ 1572. **When verification unnecessary.** While the usual course is to grant an injunction only upon a bill duly verified, it would seem that the oath of complainant or of any other person conversant with the facts may be dispensed with if the confidence of the court can be otherwise obtained. Thus,

<sup>28</sup> Smith v. Blake, 96 Mich., 542, 55 N. W., 978.

<sup>29</sup> Union Lumber Co. v. Allen, 114 Ga., 346, 40 S. E., 231.

<sup>30</sup> Attorney-General v. Rail Road Companies, 35 Wis., 593. See Attorney-General v. City of Eau Claire, 37 Wis., 400.

<sup>31</sup> Gibson v. Gibson, 46 Wis., 462, 1 N. W., 154; Tibbits v. Miller, 9 Okla., 677, 60 Pac., 95.

<sup>32</sup> Tibbits v. Miller, 9 Okla., 677, 60 Pac., 95.

documentary evidence establishing complainant's equities and his right to relief will suffice to warrant the court in granting an injunction, and such evidence may be presented by properly verified copies of private instruments, or of records, when such is the appropriate mode of proof.<sup>33</sup> And where the right, for the protection of which an injunction is sought, rests upon written instruments, such as promissory notes, none of which are exhibited and no reason or excuse is offered for the failure to present them, the relief will be withheld, although the bill is verified under oath.<sup>34</sup> And it has been held that a bill for an injunction against a judgment at law should make a transcript of the judgment an exhibit in the cause.<sup>35</sup>

§ 1573. **Prayer for injunction.** The bill should contain a specific prayer for an injunction, since the writ will not be granted under the general prayer for relief. And the injunction must be asked both in the prayer for relief and that for process; otherwise the bill is demurrable.<sup>36</sup> And although the omission of a specific prayer for the injunction is regarded as a defect in form, yet it is held error to grant the relief upon a bill thus defective.<sup>37</sup> But the defect may be cured by obtaining leave of court to amend the bill by adding the neces-

<sup>33</sup> *Negro Charles v. Sheriff*, 12 Md. 274; *Youngblood v. Schamp*, 2 McCart., 42. And where a written application for a preliminary injunction is properly verified and practically covers the allegations of the bill, it is proper to grant a preliminary injunction even though the bill itself is without verification. *State v. Loomis*, 46 Kan., 107, 26 Pac., 472.

<sup>34</sup> *Nusbaum v. Stein*, 12 Md., 315.

<sup>35</sup> *Parsons v. Wilkerson*, 10 Mo., 713.

<sup>36</sup> *Lewiston F. M. Co. v. Franklin Co.*, 54 Maine, 402; *Willet v. Woodhams*, 1 Bradwell, 411; *African M. E. Church v. Conover*, 12

*C. E. Green*, 157; *Union Bank v. Kerr*, 2 Md. Ch., 460; *Wood v. Beadell*, 3 Sim., 273; *Hairlson v. Carson*, 111 Ga., 57, 36 S. E., 319. See also *Savory v. Dyer, Amb.*, 70; *Thompson v. Maxwell*, 16 Fla., 773. But see, *contra*, *Webb v. Ridgely*, 38 Md., 364.

<sup>37</sup> *Primmer v. Patten*, 32 Ill., 528; *College C. & R. G. R. Co. v. Moss*, 77 Ind., 139. See also *Jefferson v. Hamilton*, 69 Ga., 401. In Oklahoma it is held, under the provisions of a statute, that an injunction may be granted in a divorce proceeding without a prayer therefor. *Uhl v. Irwin*, 3 Okla., 388, 41 Pac., 376.

sary prayer.<sup>38</sup> And it has been held that an injunction may be allowed upon the hearing, although not specifically prayed for in the bill.<sup>39</sup> Or the court may at the hearing, if the proof shall warrant it, permit an amendment to the bill by adding a prayer for a perpetual injunction, and may then grant such relief.<sup>40</sup> And upon a bill praying an injunction *pendente lite*, or until the further order of the court, upon which an interlocutory injunction is granted, it is not error to render a final decree for a perpetual injunction, although not prayed in the bill.<sup>41</sup>

§ 1574. **When granted.** Interlocutory injunctions are usually granted on the bill alone, before issuing process to the defendant, the allegations of the bill being properly verified and the court being satisfied of their truth.<sup>42</sup> A motion for an injunction may, however, be made at any time before final decree, and for the purposes of such motion the answer of the defendant is regarded merely as an affidavit.<sup>43</sup> And upon the filing of an injunction bill the defendant may, at his option, immediately put in his answer to prevent the issuing of the writ, and the court is bound to consider such answer and give it due weight, if filed before the application for the injunction is disposed of.<sup>44</sup> And when the motion for a preliminary injunction is heard upon bill and answer, or upon bill, answer and affidavits, and the equities of the bill are fully met and negatived, the injunction will not be granted.<sup>45</sup>

§ 1575. **Failure to present all facts.** Where a special injunction is sought *ex parte*, complainant should state in his bill

<sup>38</sup> Jacob v. Hall, 12 Ves., 458; 54 Pa. St., 28.

Wood v. Beadell, 3 Sim., 273.

<sup>44</sup> Hall v. McPherson, 3 Bland,

<sup>39</sup> Reynell v. Sprye, 1 DeGex, M. & G., 660.

529; Krone v. Krone, 27 Md., 77.

<sup>40</sup> African M. E. Church v. Conover, 12 C. E. Green, 157.

<sup>45</sup> Citizens Coach Co. v. Camden

<sup>41</sup> Wilmington S. M. Co. v. Allen, 95 Ill., 288.

Horse R. Co., 29 N. J. Eq. (2 Stew.), 299; New Jersey Z. Co. v. Franklin I. Co., Ib., 422; Wellman v. Harker, 3 Ore., 253; Atchison &

<sup>42</sup> Jones v. Magill, 1 Bland, 177.

N. R. Co. v. City of Troy, 10 Kan.,

<sup>43</sup> Warren R. Co. v. Clarion Co.,

513.

all the material facts bearing upon the subject-matter in controversy, and should set out all documents having a material bearing upon the case, so far as they touch the right to the relief sought. If he fails or neglects to bring such facts or documents to the attention of the court upon the application for the injunction, the court may, on being apprised of such omission, immediately discharge the order for the writ and direct that matters be returned to their former condition, so far as may be done.<sup>46</sup>

§ 1576. **Admission of affidavits in support of motion.** The question of the admissibility of affidavits in support of the allegations of the bill, upon a motion for an injunction, has been much controverted, but the doctrine may now be regarded as well established that complainant is entitled to read affidavits in support of his case,<sup>47</sup> although they will not be permitted to enlarge the scope of the bill, since the application must be determined upon the case as presented by the bill.<sup>48</sup> The rule, however, has been limited to affidavits upon questions of fact in distinction from those upon questions of title, since the latter are held not admissible to contradict the answer.<sup>49</sup> And it has been held that affidavits which are not offered until after the filing of the bill or the coming in of the answer are not admissible upon a motion for an injunction.<sup>50</sup> And an affidavit comes too late, upon a motion for a

<sup>46</sup> *Harbottle v. Pooley*, 20 L. T. N. S., 436.

<sup>47</sup> *United States v. Parrott*, McAll., 271; *Tatem v. Gilpin*, 1 Del. Ch., 13.

<sup>48</sup> *Leo v. Union Pacific R. Co.*, 17 Fed., 273.

<sup>49</sup> *United States v. Parrott*, McAll., 271; *Morphett v. Jones*, 19 Ves., 350. See also *Farmer v. Calvert L. E. & M. P. Co.*, 5 Chicago Legal News, 1.

<sup>50</sup> *Brundred v. Paterson Machine Co.*, 3 Green Ch., 294; *Lessig v. Langton*, Brightly, 191. But see

*Poor v. Carleton*, 3 Sumner, 83; *Hummert v. Schwab*, 54 Ill., 142. As to the practice of the English Chancery on admitting affidavits against defendant's answer upon a motion for an injunction after answer filed, see *Isaac v. Humpage*, 3 Bro. C. C. 463. The question of the admissibility of affidavits upon motions for injunctions is largely governed by the local practice or by statute in the various states, and it is impossible to state any rule of general application.

preliminary injunction, when not presented until after defendant has read his affidavits and closed his arguments.<sup>51</sup> But upon the hearing of a motion for a preliminary injunction it is proper to admit affidavits which are manifestly prepared and intended to be used upon such application, although they are not properly entitled, in the cause, the modern practice in this regard being more liberal than the former practice.<sup>52</sup> But upon the hearing of a motion for a preliminary injunction, affidavits which are not entitled in the cause and which do not otherwise show that they were made for the purpose of being used in the proceeding are inadmissible.<sup>53</sup> And it is error for a judge at chambers, in opposition to the exceptions of one of the parties to the cause, to hear and determine the issues in an injunction suit upon affidavits only, and to grant a perpetual injunction thereon.<sup>54</sup>

§ 1577. **Admission of affidavits in opposition.** Upon a motion for a preliminary injunction, a defendant who is notified of the application, or required to show cause why the injunction should not issue, may introduce affidavits in opposition to the motion, and this regardless of whether a temporary injunction has or has not been allowed in the meantime.<sup>55</sup> Upon such motion the answer of one of several defendants may be received and read as an affidavit to contradict the allegations of the bill.<sup>56</sup> And a defendant may, if he prefer, oppose the motion merely upon his affidavit and without answer.<sup>57</sup> Nor is the defendant limited, upon the hearing of such application, to evidence tending to disprove the allegations of the bill, but he may introduce any legal evidence tending to show that the

<sup>51</sup> Daugherty T. Co. v. Kittanning I. & S. Co., 178 Pa. St., 215, 35 Atl. 1111.

<sup>52</sup> Shook v. Rankin, 6 Biss., 477.

<sup>53</sup> Hill v. McBurney O. & F. Co., 112 Ga., 788, 38 S. E., 42, 52 L. R. A., 398; Warren v. Monnish, 97 Ga., 399, 23 S. E., 823.

<sup>54</sup> Hornesby v. Burdell, 9 S. C., 303.

<sup>55</sup> Seneca Falls v. Matthews, 9 Paige, 504; Kean v. Colt, 1 Halst. Ch., 365.

<sup>56</sup> Shreve v. Black, 3 Green Ch., 177.

<sup>57</sup> Baker v. Taylor, 2 Blatch. C. C., 82.

injunction should not be granted.<sup>58</sup> But an affidavit offered by the defendant in support of a motion to dissolve a preliminary injunction, which consists only of admissions and denials and of allegations which are mere conclusions, is insufficient to sustain such a motion.<sup>59</sup>

§ 1578. **Notice; federal practice.** The question of notice to defendant of an application for a preliminary injunction is largely regulated by legislation, which varies greatly in the different states. In the courts of the United States injunctions were formerly granted only upon notice, such notice being affirmatively required by the judiciary act of 1793.<sup>60</sup> By the Revised Statutes of the United States of June 22, 1874, the provision of the judiciary act of 1793 requiring notice to be given of all applications for injunctions has been repealed, and the courts of the United States, under section 718 of the Revised Statutes,<sup>61</sup> may grant an immediate restraining order, without notice, to be in force until the decision of the court

<sup>58</sup> *Stoddart v. Vanlaningham*, 14 Kan., 18. The English chancery practice does not appear to have been uniform with reference to the admissibility of affidavits contradictory to the answer, upon the hearing of a motion for an injunction. See as to this subject and as to the cases where such affidavits have been admitted or excluded, *Rock v. Mathews*, 2 De G. & Sm., 227, and note and chronological table of English cases, page 234. In Louisiana it is held that the only object of a rule *nisi*, to show cause why an injunction should not be granted, is to enable defendant to show, if possible, upon the face of the papers that the relief should not be allowed; and it is held to be improper to admit affidavits pro and con as to the merits, upon the hearing of the rule

*nisi*. *Heyniger v. Hoffnung*, 29 La. An., 57.

<sup>59</sup> *Marks v. Weinstock*, 121 Cal., 53, 53 Pac., 362.

<sup>60</sup> 1 U. S. Statutes at Large, Ch. 22, § 5; *Mowrey v. Indianapolis & C. R. Co.*, 4 Biss., 78.

<sup>61</sup> Section 718 of the Revised Statutes of the United States of 1874 enacts as follows: "Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge." 1 U. S. Comp. Stat. 1901, p. 580.

upon the motion for an injunction; and it is held that the courts possess the same power in patent causes under section 4921 of the Revised Statutes.<sup>62</sup> When, under the federal practice, notice is given of an application for an injunction, it is held not to be competent for plaintiff to fix the time of hearing so far ahead as to embarrass defendant, and that it is the right of the latter to come in and have the matter disposed of within a reasonable time.<sup>63</sup>

§ 1579. **Notice further considered.** It may be said generally upon the question of notice, that, in the absence of pressing necessity, it is regarded as improper to grant an interlocutory injunction without notice.<sup>64</sup> And while emergencies may arise which will warrant the granting of an injunction without notice to the defendant who is sought to be enjoined, yet when a period of six weeks is permitted to elapse after the filing of the bill before the application for an injunction is made, the emergency will not be regarded as so pressing as to warrant the relief without an attempt to notify the defendants.<sup>65</sup> So where plaintiff delays filing his bill until the danger of irreparable injury resulting from the refusal of an injunction without notice is imminent, an injunction without notice should not be granted.<sup>66</sup> So if defendant has been notified of the motion which he is ready and willing to meet, an injunction should not afterward be allowed against him *ex parte* because, owing to the pressure of business, the motion could not be heard at the time fixed.<sup>67</sup> Nor should an injunction be allowed on an

<sup>62</sup> *Yuengling v. Johnson*, 1 Hughes, 607; 3 U. S. Comp. Stat. 1901, p. 3395.

<sup>63</sup> *Walworth v. Board of Supervisors*, 5 Biss., 133.

<sup>64</sup> *Androvette v. Bowne*, 4 Ab. Pr., 440; S. C., 15 How. Pr., 75. See as to the necessity of notice before granting an interlocutory injunction affecting large interests, *Atchison, T. & S. F. R. Co. v. Fletcher*, 35 Kan., 236, 10 Pac., 596.

<sup>65</sup> *Swepson v. Call*, 13 Fla., 337.

<sup>66</sup> *Weaver v. Toney*, 107 Ky., 419, 54 S. W., 732, 50 L. R. A., 105. And it was held that a mandatory injunction without notice was void and that defendant was not guilty of contempt of court in disregarding it.

<sup>67</sup> *Graham v. Campbell*, 7 Ch. D., 490.

*ex parte* application upon a supplemental bill, affecting the rights of a party who has appeared in the cause, but due notice of the application should be given. And if in such case a temporary injunction is necessary to prevent irreparable injury before regular notice of the application can be given, a rule to show cause should be granted at the same time with the granting of the temporary injunction, which falls if the rule be not made absolute.<sup>68</sup> And in no event can the failure to give notice of the application for an injunction be raised in a collateral proceeding.<sup>69</sup>

§ 1580. **The same.** Where a rule of court requires notice of the application for an injunction after answer filed, such notice may be waived in the exercise of a sound judicial discretion, and the omission of the notice constitutes no ground for a dissolution.<sup>70</sup> And when, upon the final hearing of a cause, the evidence warrants a perpetual injunction, which is granted accordingly, it affords no ground for reversing such decree that a preliminary injunction was granted in the cause without notice to defendant.<sup>71</sup> And a motion to dissolve a temporary injunction for want of equity operates as a waiver of any irregularities in the issuing of the injunction and of the fact that it was granted without notice.<sup>72</sup> It is, however, sufficient ground for reversing a decree awarding a final injunction that it was granted without notice to defendant, or a hearing in his

<sup>68</sup> *Bloomfield v. Snowden*, 2 Paige, 355. But in *Buckley v. Corse*, Saxt., 504, it was held that when an injunction was applied for after the filing of the bill and after appearance by defendant, the latter need not be notified of the application merely because he had entered an appearance in the cause.

<sup>69</sup> *Uhl v. Irwin*, 3 Okla., 388, 41 Pac., 376.

<sup>70</sup> *Buckley v. Corse*, Saxt., 504. But it has been held in Florida,

under a statute prohibiting an injunction against proceedings at law without notice, to be no abuse of judicial discretion to grant the relief without notice, when defendant can not be found and when there is danger that the injury feared will be committed before notice can be served. *Lewton v. Hower*, 18 Fla., 872.

<sup>71</sup> *Brown v. Luehrs*, 79 Ill., 575.

<sup>72</sup> *Williams v. Chicago Exhibition Co.*, 188 Ill., 19, 58 N. E., 611. And see, *post*, § 1615.



behalf.<sup>73</sup> But where a bill seeking an injunction is manifestly without equity, it is proper for the court to refuse the relief upon a mere inspection of the bill, and without granting a rule *nisi* upon defendant to show cause against the motion for an injunction.<sup>74</sup>

§ 1581. **Positive allegations of fact necessary; irreparable injury.** An interlocutory injunction, being a harsh remedy, is only allowed upon such positive averments of complainant's equities as establish a clear *prima facie* case. And while the party seeking the injunction is not required to establish his right to relief with the same precision and certainty that are required upon a final hearing, he must in all cases allege positively the facts on which he relies.<sup>75</sup> Mere argumentative allegations, or inferences from facts stated, will not entitle him to relief.<sup>76</sup> Nor will general allegations of irreparable injury suffice, when he does not state the facts upon which the allegations are based.<sup>77</sup> And plaintiff must show how and why the damages sustained will prove irreparable, since the question of irreparable damage or injury is a question to be decided by the court from the facts stated.<sup>78</sup>

§ 1582. **Form and contents of writ.** The form of the writ must of course vary with the particular circumstances of each case, the subject-matter of the injunction, and the parties enjoined. It should contain a description of the particular acts

<sup>73</sup> *State v. Jacksonville, P. & M. R. Co.*, 15 Fla., 201.

<sup>74</sup> *Remshart v. The Savannah & Charleston R. Co.*, 54 Ga., 579; *Brown v. Wilson*, 56 Ga., 534.

<sup>75</sup> *Perkins v. Collins*, 2 Green Ch., 482; *Holdrege v. Gwynne*, 3 C. E. Green, 26; *Campbell v. Morrison*, 7 Paige, 157; *Bank of Orleans v. Skinner*, 9 Paige, 305; *Bogert v. Haight*, *Id.*, 297; *Jones v. Macon & B. R. Co.*, 39 Ga., 138; *Warsop v. City of Hastings*, 22 Minn., 437.

<sup>76</sup> *Battle v. Stephens*, 32 Ga., 25. And see *Warsop v. City of Hastings*, 22 Minn., 437.

<sup>77</sup> *Branch Turnpike Co. v. Supervisors*, 13 Cal., 190; *Bailey v. Simpson*, 57 Ga., 523; *Crescent City S. H. Co. v. Police Jury*, 32 La. An., 1192; *Crescent City S. H. Co. v. Butchers U. S. Co.*, 33 La. An., 930.

<sup>78</sup> *McKinzie v. Mathews*, 59 Mo., 99; *Schuster v. Myers*, 148 Mo., 422, 50 S. W., 103.

or things concerning which defendant is enjoined, and should be an authentic notification of the mandate of the court.<sup>79</sup> The injunction as granted must be such as is prayed for by the bill, and it is not competent for a court of equity to grant an injunction in terms other than those contained in the prayer of the bill.<sup>80</sup> And the fact that the injunction as granted is broader in terms than the prayer of the bill may afford ground for setting aside the order.<sup>81</sup>

§ 1583. **Failure to file original or amended bill; injunction before filing of bill; how waived.** The fact that the bill was not filed until after the injunction was ordered is not sufficient ground for a reversal of the order, such omission being at the most but a mere irregularity which does not affect the merits of the cause.<sup>82</sup> And being such a mere irregularity, it will be deemed waived by the filing of an answer by the defendant and the making of a motion to dissolve for want of equity or upon the denials of the answer.<sup>83</sup> If, however, the court has sustained a demurrer to the bill and no amended bill has yet been filed, although leave to amend was given, it is improper to continue the original injunction, there being nothing on which to base it except the original summons and affidavits in support of the bill, the bill having been held not to state a cause of action.<sup>84</sup>

§ 1584. **English and American practice as to time of granting.** Under the former English practice, although the Court

<sup>79</sup> Whipple v. Hutchinson, 4 Blatch., 190; Summers v. Farish, 10 Cal., 347.

<sup>80</sup> Burdett v. Hay, 33 L. J. Ch., 41.

<sup>81</sup> Leitham v. Cusick, 1 Utah, 242.

<sup>82</sup> Davis v. Reed, 14 Md., 152. And in a case of great urgency an injunction was granted by one of the English Vice-Chancellors before the filing of the bill, upon plaintiff's undertaking to file the bill and affidavits in its support

during the day. Thornloe v. Skoines, L. R. 16 Eq., 126. See also Carr v. Morice, L. R. 16 Eq., 125, where an injunction was allowed before bill filed, the bill not being filed because of the day being a public holiday and the court and all the offices being closed.

<sup>83</sup> *Ex parte* Sayre, 95 Ala., 288, 11 So., 378; Henry v. Watson, 109 Ala., 335, 19 So., 413.

<sup>84</sup> Vliet v. Sherwood, 37 Wis., 165.

of Chancery was not limited to terms as were the courts of common law, yet a motion for an injunction could only be made in term or "during the seal;" but under the later practice a common injunction for want of appearance might be obtained on any day on which the court sat.<sup>85</sup> Under the earlier English practice, also, if a plea were interposed to the bill the court would not entertain a motion for an injunction before disposing of the plea.<sup>86</sup> Nor would an injunction be granted pending a demurrer to the bill.<sup>87</sup> And where an injunction was sought, the effect of which would be to restrain defendant from pursuing his trade, the court refused to interfere before answer.<sup>88</sup> In this country the courts are frequently empowered to grant injunctions during vacation, but questions concerning such power are so purely statutory as to admit of no general governing principle outside of the letter of the statute conferring such jurisdiction; but it is believed that in most of the states interlocutory injunctions may be granted upon the filing of the bill and before answer. And a court of equity, independent of statute, has power to issue a preliminary injunction upon Sunday, in a case where immediate relief is necessary for the prevention of irreparable injury.<sup>89</sup> \*

§ 1585. **Supplemental bill.** When events have occurred since the institution of the original suit for an injunction which would warrant the relief, it is proper to allow such matters to be presented by a supplemental bill.<sup>90</sup> But when a supplemental bill is allowed after the filing of the original bill, it should be put in under oath.<sup>91</sup>

§ 1586. **Subsequent application; res judicata.** The refusal to grant an injunction upon an interlocutory application

<sup>85</sup> *Chesterfield v. Bond*, 2 Beav., 263.

<sup>86</sup> *Humphreys v. Humphreys*, 3 P. Wms., 395.

<sup>87</sup> *Cousins v. Smith*, 13 Ves., 164.

<sup>88</sup> *Jackson v. Barnard*, Ca. temp. H., 259.

<sup>89</sup> *Langabier v. Fairbury*, P. & N. R. Co., 64 Ill., 243.

<sup>90</sup> *Howard v. Simmons*, 25 La. An., 668.

<sup>91</sup> *Richardson v. Dinkgrave*, 26 La. An., 651.

constitutes no bar to a subsequent renewal of the application, which can only be barred by a decree upon a full and final hearing.<sup>92</sup> There is, therefore, no impropriety in making a second application for an injunction which has once been refused, when new and additional matter is presented which has been discovered since the former hearing.<sup>93</sup> And inasmuch as there are many grounds other than the sufficiency of the bill upon which a preliminary injunction may be refused, an order denying an interlocutory application is not *res judicata* as to its sufficiency.<sup>94</sup> But a judgment between the same parties dissolving an injunction upon final hearing operates as a bar to the granting of a subsequent injunction upon the same grounds, or upon grounds existing prior to the suit in which the judgment of dissolution was rendered, and of which plaintiff in that suit might have availed himself in the first instance.<sup>95</sup>

§ 1587. **Waiver of answer under oath.** Upon the question of the effect of a waiver of defendant's answer under oath it is held that when plaintiff waives a discovery under oath, he is not thereby absolved from the burden of making out his case for an injunction upon the interlocutory as well as upon the final hearing.<sup>96</sup> And although plaintiff by his bill waives the answer of defendant under oath, if defendant puts in his answer under oath it may be used as an affidavit in support of a motion to dissolve.<sup>97</sup>

<sup>92</sup> *Glass v. Clark*, 41 Ga., 544; *Halcombe v. Commissioners*, 89 N. C., 346.

<sup>93</sup> *Blizzard v. Nosworthy*, 50 Ga., 514; *Halcombe v. Commissioners*, 89 N. C., 346. But in *France v. France*, 4 Halst. Ch., 619, it was held that after an injunction had been regularly dissolved on the coming in of the answer, a motion for a renewal would not be entertained upon testimony subsequently taken.

<sup>94</sup> *Rogers v. Week Lumber Co.*, 117 Wis., 5, 93 N. W., 821.

<sup>95</sup> *Porter v. Morere*, 30 La. An., 230; *Terre Haute & Indianapolis R. Co. v. Peoria & Pekin Union R. Co.*, 182 Ill., 501, 55 N. E., 377.

<sup>96</sup> *Mathews v. Cody*, 60 Ga., 355.

<sup>97</sup> *Andrews v. Knox Co.*, 70 Ill., 65. See *dictum* in *Hentz v. Bank*, 76 Miss., 429, 24 So., 902, to the effect that the rule does not apply because of a statute providing that if complainant waives answer under oath, the answer of the defendant, "whether sworn to or not, shall not be evidence" for the defendant.

§ 1588. **Scandal in bill.** When a bill for an injunction is referred to a master because of scandal, and the master reports that it is scandalous, and an order is entered expunging the scandalous matter, the court will not entertain a motion for an injunction until the scandal is expunged, since until then it can not be determined what the bill really is.<sup>98</sup>

§ 1589. **Irregularity in service of process; defective allegations.** A mere irregularity in the service of process in the cause affords no ground for withholding an injunction against a defendant who has notice of the motion and appears in opposition.<sup>99</sup> But a bill for an injunction which does not allege that defendant is doing or threatening the acts which are sought to be enjoined is bad on demurrer, even though it be alleged that the act in question will result in great and irreparable injury to plaintiffs.<sup>1</sup>

§ 1590. **Retaining injunction to the hearing.** Where upon motion to continue an injunction until the hearing it is apparent to the court that there is a serious question for the hearing, which if determined in plaintiff's favor will entitle him to the relief sought, the injunction will be retained until the hearing.<sup>2</sup> And where upon the filing of the bill an injunction is granted in part to the extent prayed, upon the argument of a rule to show cause why the injunction should not issue as prayed by the bill the existing injunction will not be removed or dissolved, a notice and motion being requisite for such purpose.<sup>3</sup>

§ 1591. **Practice in awarding perpetual injunction.** The practice of allowing a perpetual injunction upon motion founded upon affidavits is without precedent and will not be entertained.<sup>4</sup> Nor will a final injunction be granted by a mere order when no action is pending between the parties, actions

<sup>98</sup> Davenport v. Davenport, 6 Madd. (1st American Edition), 157.

<sup>99</sup> Thayer v. Wales, 9 Blatch., 170; S. C., 5 Fish., 130.

<sup>1</sup> Ploughe v. Boyer, 38 Ind., 113.

<sup>2</sup> Donnell v. Church, 4 Ir. Eq., 630.

<sup>3</sup> Manhattan M. & F. Co. v. Van Keuren, 8 C. E. Green, 251.

<sup>4</sup> Whitehurst v. Green, 69 N. C., 131.

embracing the controversy between them having already proceeded to final judgment without the granting of an injunction.<sup>5</sup> But where, under the practice of a state, the right to a perpetual injunction is submitted to a jury, who find a special verdict, the facts of which warrant such an injunction, it is proper for the court to award it, although the jury have not in express terms found that defendant should be perpetually enjoined.<sup>6</sup>

§ 1591 *a*. **Weight of denials of answer on interlocutory application.** Upon a motion for an interlocutory injunction, made after answer filed, the denials of the answer are to be given no more weight than the allegations of the bill which they deny, and it is therefore erroneous to determine such an application as in the case of a hearing upon bill and answer.<sup>7</sup>

<sup>5</sup> *Jackson v. Bunnell*, 113 N. Y., 216, 21 N. E., 79.

<sup>7</sup> *Webb v. King*, 21 App. D. C., 141.

<sup>6</sup> *McManus v. Cook*, 59 Ga., 485.

## II. AMENDMENTS.

- § 1592. The general doctrine.  
 1593. Amendment after dissolution.  
 1594. Amendment without prejudice; manner of amending.  
 1595. Dissolution notwithstanding amendment; supplemental bill.  
 1596. When defendant entitled to notice.  
 1597. The Irish practice.  
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§ 1592. **The general doctrine.** While the propriety of allowing amendments to injunction bills has been said to be exceedingly questionable,<sup>1</sup> it may be regarded as an established rule that the bill may be amended, even after motion to dissolve the injunction, and if, when so amended, it shows sufficient cause for continuing the injunction, which is not overborne by defendant, it will be continued.<sup>2</sup> And it is not error to overrule a motion for a dissolution on the ground of defects in the bill, when an amended bill has been filed curing those defects and taking the place of the original without changing the cause of action.<sup>3</sup> The right to amend should be guarded with the utmost caution by the court, and amendments should be allowed only when the circumstances of the case indicate that the promotion of justice requires this course.<sup>4</sup> And in all cases the truth of the new allegations, as well as the causes requiring the amendment, should be duly verified by affidavit.<sup>5</sup> And

<sup>1</sup> *Calderwood v. Trent*, 9 Rob. (La.), 227.

<sup>2</sup> *Crawford v. Paine*, 19 Iowa, 172. And see *Sweatt v. Faville*, 23 Iowa, 321; *Edwards v. Jenkins*, 3 Bro. C. C., 426. But see *Rhodes v. Union Bank*, 7 Rob. (La.), 63, where it is held that after the filing of a motion to dissolve complainant will not be allowed to support his original proceedings

and give effect to an injunction originally illegal, by new allegations. It is to be observed, however, that in this case the new allegations were not sworn to.

<sup>3</sup> *Sweatt v. Faville*, 23 Iowa, 321.

<sup>4</sup> *Calderwood v. Trent*, 9 Rob. (La.), 227. See also *Sharp v. Ashton*, 3 Ves. & B., 144.

<sup>5</sup> *Id.*

amendments should never be allowed when they are obviously intended for purposes of delay.<sup>6</sup> Nor is the practice to be approved of permitting plaintiff, after obtaining a full answer from defendant, to amend by introducing new matter.<sup>7</sup> And an amendment to an injunction bill after answer, without prejudice to an injunction already granted, should be allowed with great caution and only upon special grounds being shown by affidavit.<sup>8</sup>

§ 1593. **Amendment after dissolution.** After an injunction has been actually dissolved upon the merits, complainant may still amend his bill and obtain a new injunction upon the bill as thus amended.<sup>9</sup> It is to be observed, however, that after a dissolution has been allowed for want of equity in the bill, the court will not entertain an application, *ex parte*, for another injunction upon an amended bill, or upon a new one supplying the equity wanting in the first, but will require notice to the defendant; since, if complainant is willing to swear to a bill fitting the opinion of the court, defendant's rights should not be interfered with without allowing him to be first heard.<sup>10</sup>

§ 1594. **Amendment without prejudice; manner of amending.** An injunction bill may be amended without prejudice to the existing injunction, by obtaining leave of court for that purpose, the amendments relating to matters existing prior to the filing of the bill.<sup>11</sup> And the prevailing doctrine now is that whenever, pending an injunction, an amendment is allowed to the bill, it is without prejudice to the injunction, which still stands, although the order granting leave to amend is silent as to its effect upon the injunction.<sup>12</sup> So plaintiff may amend even

<sup>6</sup> *Calderwood v. Trent*, 9 Rob. (La.), 227.

<sup>7</sup> See opinion of Lord Eldon in *Powell v. Lassalette*, Jac., 549.

<sup>8</sup> *Jackson & S. Co. v. Philadelphia, W. & B. R. Co.*, 3 Del. Ch., 512.

<sup>9</sup> *Buckley v. Corse*, Saxt., 504.

<sup>10</sup> *Hornor v. Leeds*, 2 Stockt., 86.

<sup>11</sup> *Walker v. Walker*, 3 Ga., 302; *Mair v. Thellusson*, 3 Ves. & B., 145, note.

<sup>12</sup> *Selden v. Vermilya*, 4 Sandf. Ch., 573; *Harvey v. Hall*, L. R. 11 Eq. 31; *Warburton v. London & B. R. Co.*, 2 Beav., 253. And the fact that plaintiff had amended his bill, while it might afford ground



after demurrer filed, and the amendment will not prejudice the injunction.<sup>13</sup> But a sworn bill can not be amended by striking out material allegations, and the amendments are to be made by the addition of explanatory and supplemental statements. These should be distinctly presented to the court, properly verified under oath, with a sufficient excuse for their not having been presented in the original bill.<sup>14</sup>

§ 1595. **Dissolution notwithstanding amendment; supplemental bill.** While it is within the province of a court of equity to permit amendments to injunction bills, yet if complainant, instead of amending his original bill so as to sustain an injunction already granted, files what is in fact a new bill, praying for a new injunction, the court may properly dissolve the injunction upon a motion filed before the amended bill, notwithstanding such amendment.<sup>15</sup> And if the original bill shows no sufficient ground for the relief prayed, it can not be aided by a supplemental bill presenting matters which have arisen since the commencement of the suit, when such matters have no connection with the grounds of relief relied upon in the original bill.<sup>16</sup>

§ 1596. **When defendant entitled to notice.** When a bill is amended by praying for an injunction against a defendant as to whom no injunction was originally prayed, he is entitled to reasonable notice and an opportunity to show cause why the relief should not be granted. And the omission of such notice, or opportunity to show cause, has been held sufficient ground for reversing the judgment of the court granting the injunction.<sup>17</sup>

for dissolving the common injunction under the English practice, upon an application for that purpose, did not operate *ipso facto* as a dissolution. *Brooks v. Purton*, 1 Y. & C. C. C., 271. See also opinion of Lord Cottenham in *Ferrand v. Hamer*, 4 Myl. & Cr., 143.

<sup>13</sup> *Warburton v. London & B. R. Co.*, 2 Beav., 253.

<sup>14</sup> *Carey v. Smith*, 11 Ga., 539.

<sup>15</sup> *Des Moines R. Co. v. Carpenter*, 27 Iowa, 487.

<sup>16</sup> *Fahs v. Roberts*, 54 Ill., 192.

<sup>17</sup> *Kehler v. The Jack Manufacturing Co.*, 55 Ga., 639.

§ 1597. **The Irish practice.** Under the Irish chancery practice a motion to amend an injunction bill, after appearance and answer by defendant, is not a motion of course, and where plaintiff does not show that the matter of the proposed amendment has come to his knowledge since answer, and when he has been guilty of considerable laches in asking leave to amend, the motion will be refused.<sup>18</sup>

§ 1598. **Omitting non-resident defendant.** It is proper, upon the hearing of a motion for an interlocutory injunction, to permit the bill to be amended by striking out the name of a non-resident defendant, who is not served with process, without prejudice to the motion.<sup>19</sup>

§ 1598 a. **When amended bill need not be sworn to.** Where an injunction has been granted upon a sworn original bill, and an amended bill is afterward filed, such amended bill need not be sworn to where no relief by way of injunction is prayed in the amended bill and the injunction itself does not require for its support the additional matter brought out by the amendment.<sup>20</sup>

<sup>18</sup> O'Beirne v. O'Beirne, 1 Ir. Ch., 152.

<sup>20</sup> Bauer Grocer Co. v. Zelle, 172 Ill., 407, 50 N. E., 238.

<sup>19</sup> Cole Co. v. Virginia Co., 1 Sawy., 470.

## III. PRACTICE IN DISSOLVING INJUNCTIONS.

- § 1599. Motion to dissolve, when entertained.
- 1600. Notice of motion to dissolve.
  - 1601. Defendant's answer, when excluded.
  - 1602. Objections to answer for insufficiency.
  - 1603. Admission of affidavits on motion to dissolve.
  - 1604. Affidavits not allowed to take the place of answer.
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  - 1610. Practice on death of defendant.
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  - 1612. Effect of sworn answer.
  - 1613. Multifariousness of bill; improper joinder of parties.
  - 1614. Defective verification can not be remedied on motion to dissolve.
  - 1615. Filing of answer a waiver of objections to refusal of dissolution.
  - 1616. Rule *nisi*, English practice.
  - 1617. Rights of stranger to suit.
  - 1618. Final hearing.

§ 1599. **Motion to dissolve, when entertained.** Motions for the dissolution of interlocutory injunctions are usually made upon the coming in of the answer, which is to be taken as true in so far as it is responsive to the allegations of the bill.<sup>1</sup> If the injunction has been granted *ex parte*, the court will at any time hear a motion to dissolve for want of equity in the bill.<sup>2</sup> And where the writ has been allowed by a judge at chambers, a motion to dissolve may nevertheless be made directly to the court, without applying to the same judge.<sup>3</sup> Nor is it necessary that defendant should have been served with process in the

<sup>1</sup> Harris v. Sangston, 4 Md. Ch., 394; Merwin v. Smith, 1 Green Ch., 182.

<sup>2</sup> Receivers v. Biddle, 3 Green Ch., 222.

<sup>3</sup> Woodruff v. Fisher, 17 Barb., 224.

cause, since, if otherwise apprised of the existence of the injunction, he may voluntarily appear and apply for a dissolution.<sup>4</sup>

§ 1600. **Notice of motion to dissolve.** A motion for a dissolution will not usually be entertained without notice to the opposite party,<sup>5</sup> and even where the right exists by statute of dissolving or vacating an injunction without notice, this should not be done unless from the urgency of the case such a course is necessary to guard against serious loss.<sup>6</sup> The notice should point out the particular grounds on which a dissolution is sought, and it is not sufficient to state generally that it is for irregularity in the proceedings, but it should appear in what the irregularity complained of consists.<sup>7</sup> And the court itself must be the judge as to what constitutes reasonable notice.<sup>8</sup>

§ 1601. **Defendant's answer, when excluded.** Where notice of the motion for a dissolution is given before answer filed, defendant will not be allowed to read his answer subsequently filed in support of the motion, since complainant, on being notified of the motion, has a right to expect that it will be heard upon the case as it then stands.<sup>9</sup> And upon a motion to dissolve an injunction granted against two defendants, an answer purporting to be that of both defendants, but which is in fact the answer of but one of them, and is only sworn to by one, will not be admitted.<sup>10</sup>

§ 1602. **Objections to answer for insufficiency.** The defendant in an injunction suit, by his motion to dissolve, plants

<sup>4</sup> *Waffle v. Vanderheyden*, 8 Paige, 45.

<sup>5</sup> *Newton Manufacturing Co. v. White*, 47 Ga., 400; *Pike v. Bates*, 34 La. An., 391; *State v. Monroe*, 50 La. An., 642, 23 So., 608; *Page v. Vaughn*, 133 Cal., 335, 65 Pac., 740.

<sup>6</sup> *Peck v. Yorks*, 41 Barb., 547; *O'Conner v. Starke*, 59 Miss., 481.

<sup>7</sup> *Miller v. Traphagen*, 2 Halst. Ch., 200.

<sup>8</sup> *Newton Manufacturing Co. v. White*, 47 Ga., 400. See also *Flurence v. Paschal*, 48 Ala., 458. And see as to sufficiency of notice to solicitor of motion to dissolve, *Hiller v. Cotten*, 54 Miss., 551.

<sup>9</sup> *Cattell v. Nelson*, 3 Halst. Ch., 122.

<sup>10</sup> *Vaughn v. Johnson*, 1 Stoekt., 173.

himself upon the answer and its sufficiency, and stands pledged to sustain it, since by it he must stand or fall. And since the motion is founded on the correctness of the answer, objections of every kind may be made to its sufficiency upon the hearing of the motion to dissolve.<sup>11</sup> Hence it follows that exceptions to the answer will not, *per se*, prevent the dissolution of an injunction, but the court will look into the exceptions upon the argument of the motion to dissolve, and will give them the weight to which they are entitled.<sup>12</sup> And since, for the purposes of the motion to dissolve, such allegations of the bill as are not answered are taken as true, the fact that exceptions to the answer for insufficiency have not been disposed of affords no ground of objection to the dissolution.<sup>13</sup> A different rule, however, prevailed under the English practice, and if after filing his answer defendant neglected to avail himself of his privilege of moving to dissolve until exceptions were filed to his answer, he was not allowed to move for a dissolution until his exceptions were disposed of by the court.<sup>14</sup> But the English rule has never been received with favor in this country, and where parts of the answer are responsive to the bill upon matters within defendant's knowledge, and fully deny the equity upon which the injunction rests, it is no reason for retaining the injunction that some of the exceptions to the answer are well taken.<sup>15</sup>

§ 1603. **Admission of affidavits on motion to dissolve.** Upon a motion to dissolve, on the coming in of the answer, complainant will not usually be allowed, unless a different practice prevails by statute, to file additional affidavits, either in support

<sup>11</sup> Gibson v. Tilton, 1 Bland, 352.

<sup>12</sup> Smith v. Thomas, 2 Dev. & Bat. Eq., 126; Edney v. Motz, 5 Ired. Eq., 233; Wyckoff v. Cochran, 3 Green Ch., 420; Jones v. Magill, 1 Bland, 177; Salmon v. Clagett, 3 Bland, 125; Bradford v. Peckham, 9 R. I., 250.

<sup>13</sup> Baltimore & O. R. R. v. Wheeling, 13 Grat., 40.

<sup>14</sup> Howes v. Howes, 1 Beav., 197; Williams v. Davis, 1 Sim. & Stu., 262.

<sup>15</sup> Mitchell v. Mitchell, 5 C. E. Green, 234.

of his bill, or for the purpose of contradicting the answer.<sup>16</sup> Some exceptions to the rule are, however, recognized by the authorities, and where the effect of a dissolution would be that the parties would not remain *in statu quo* upon the final hearing, and where, as in cases of waste or nuisance, serious and irreparable mischief would ensue from the delay, the strictness of the rule may be relaxed.<sup>17</sup> But in cases of injunctions relat-

<sup>16</sup> Gentry v. Hamilton, 3 Ired. Eq., 376; Howell v. Robb, 3 Halst. Ch., 17; Eastburn v. Kirk, 1 Johns. Ch., 444; Roberts v. Anderson, 2 Johns. Ch., 202; Moredock v. Williams, 1 Overt., 325. But see, *contra*, Henry v. Watson, 109 Ala., 335, 19 So., 413; Hyland A. & B. R. Co. v. Birmingham Ry. & E. Co., 113 Ala., 239, 21 So., 342. Notwithstanding the decided weight of authority in support of the rule as laid down in the text, it has been strongly contended by Mr. Justice Story that the admission of affidavits upon a motion to dissolve should be left entirely to the discretion of the court. In Poor v. Carleton, 3 Sumner, 70, that learned jurist observes as follows: "The admission of the affidavits, whether filed before or after the answer, whether they are to the title of the plaintiff or to the acts of the defendant, although they are contradictory to the answer, ought to rest in the sound discretion of the court, according to the circumstances of each particular case, without the court's binding itself by any fixed and unalterable rules, as to the exercise of that discretion. \* \* The truth seems to be, that, in cases of this sort, the practice has been shifting, from time to time, to meet the new exigencies of society and the pressure of pecu-

liar circumstances; and the court has never suffered itself to be entrapped by its own rules, so as to interfere with the purposes of substantial justice. The practice in America has, I believe, on this subject, become more liberal than it is in England; and if it were necessary, I should not hesitate to admit affidavits to contradict the answer, for the purpose of continuing or even of granting a special injunction, where I perceived that without it irreparable mischiefs would arise. In the present case, there are circumstances which might free me from the necessity of asserting so broad a doctrine. But I wish rather to dispose of the case upon the general ground that the granting and dissolving injunctions in cases of irreparable mischief rest in the sound discretion of the court, whether applied for before or after answer; and that affidavits may after answer be read by the plaintiff to support the injunction, as well as by the defendant to repel it, although the answer contradicts the substantial facts of the bill, and the affidavits of the plaintiff are in contradiction of the answer."

<sup>17</sup> Davis's Ex'rs v. Fulton, 1 Overt., 121; Moredock v. Williams, 1 Overt., 325; Barnard v. Davis, 54 Ala., 565.

ing to partnership matters, as where one member of a firm is restrained from using the co-partnership name, or doing any act relating to the business of the firm, complainant will not be allowed, on a motion to dissolve, to read *ex parte* affidavits to contradict the answer.<sup>18</sup> And upon showing cause against the

<sup>18</sup> *Eastburn v. Kirk*, 1 Johns. Ch., 444. And see *Roberts v. Anderson*, 2 Johns. Ch., 202. But see, *contra*, *Naylor v. Wellington*, 8 Sim., 396. "The general rule," says Kent, Chancellor, in *Eastburn v. Kirk*, "is against the admission of affidavits in these cases, and the instances in which they have been admitted are special, and exceptions to the general rule. Lord Kenyon, when Master of the Rolls, appears to have doubted the correctness of the practice in any case. They have been admitted in cases of waste, and in cases analogous, resting on the same principle, and where irreparable mischief might ensue; and I am aware that partnership cases have been brought within this rule. In one of the cases cited (2 Bro., 89), the affidavits sought to be read against the answer were the original affidavits on which the injunction to stay waste had been founded, and which the defendant must have had an opportunity to have seen before his answer. In this case, the injunction was granted upon the filing of the bill, and the answer meets the charges; but if these affidavits are to be admitted, the defendant, on whom they must operate as a surprise, can have no opportunity to meet them; for it is well understood, in all the cases, that affidavits can not be admitted in support of the answer in

this stage of the cause; and the defendant might be condemned, upon the strength of these affidavits, to a suspension of the exercise of his rights as a partner, until the hearing, without any opportunity or means of vindicating himself. This case does not strike me as very analogous to the case of waste. The injunction, here, is not to restrain the defendant from committing waste, or doing a positive wrong, but from the exercise of all his rights as partner, from the apprehension that he may abuse them. The allegation of previous abuse is made, on one side, by the bill, and denied on the other, by the answer; and if the answer be full, and a denial of all equity, and of every *gravamen* in the bill, it must, upon the present motion, be taken for true. If the injunction is dissolved, the defendant may, undoubtedly, abuse his rights as a partner to the injury of his co-partners; but the case does not seem to contemplate the occurrence of mischief which the law would deem irreparable, and future abuse may be the ground for further application. In the case from 9 Vesey (*Berkeley v. Brymer*, 9 Ves., 355), the Chancellor refused affidavits to support an injunction to restrain the negotiation of a bill. To admit the affidavits in this case would be to authorize their admission in every

dissolution it is not competent for plaintiff to introduce affidavits as to matters alleged in his bill of which defendant by his answer avers his ignorance.<sup>19</sup> So where the answer clearly and explicitly denies plaintiff's title, which is the foundation of the relief prayed, *ex parte* affidavits should not be received to contradict such denials.<sup>20</sup> And in Ohio it is held under the provisions of the statute<sup>21</sup> that the filing of affidavits in support of a motion to dissolve is permissive merely, and that the court may hear oral testimony; and a witness is accordingly guilty of perjury in swearing falsely upon such an application.<sup>22</sup>

§ 1604. **Affidavits not allowed to take the place of answer.** The general rule is well established that a motion to dissolve an injunction should be based upon defendant's answer, and that affidavits will not be allowed to take the place of the answer for the purposes of the motion.<sup>23</sup> Nor is it proper to introduce affidavits in support of the answer, on a motion to dissolve, where the same motion has been denied on the answer itself. If the answer in such case be deemed insufficient, the dissolution will be refused and the injunction will stand until the trial.<sup>24</sup> The rule as here laid down, however, is to be understood as excluding only *ex parte* affidavits, and it is held that depositions taken upon due notice, after an injunction has been sustained and the cause continued, may be read on a motion to dissolve made by defendant on an amended answer.<sup>25</sup> And for

other case, and would go to destroy the general rule. The motion for their admission must be denied."

<sup>19</sup> *Castellain v. Blumenthal*, 12 Sim., 47.

<sup>20</sup> *Barnard v. Davis*, 54 Ala., 565. Under the code of procedure in California, if defendant bases his motion to dissolve upon the papers on which the injunction was granted, plaintiff is not allowed to make further showing by affidavits in support of his case. But if defendant makes a counter show-

ing by affidavits, either with or without answer, plaintiff is permitted to introduce affidavits in rebuttal. *Falkinburg v. Lucy*, 35 Cal., 52. See also *Delger v. Johnson*, 44 Cal., 182.

<sup>21</sup> §§ 5573, 5583, 5584 and 5585 of the Revised Statutes.

<sup>22</sup> *State v. Budd*, 65 Ohio St., 1, 60 N. E., 988.

<sup>23</sup> *Sacket v. Hill*, 2 Mich., 182.

<sup>24</sup> *Hoffman v. Livingston*, 1 Johns. Ch., 211.

<sup>25</sup> *Leroy v. Dickerson*, 1 Carolina Law Repository, 110.



the purposes of a motion to dissolve, which is based upon the bill, answer and affidavits, the answer may be considered as an affidavit.<sup>26</sup>

§ 1605. **Distinction as to common and special injunctions.** A distinction as to the practice upon motions to dissolve has been taken between what are called common or ordinary injunctions, such as those to judgments at law, and special injunctions for the prevention of irreparable mischief, as in cases of waste. The distinction is based upon the fact that, in cases of the latter description, the injunction is not, as in the former, in aid of or secondary to another equity, but is the very point in the case and the ultimate and only relief sought. It is accordingly held, in cases of special injunctions for the prevention of irreparable injuries, that, on a motion to dissolve, the bill may be read in contradiction to the answer, and if the equity appears in doubt, the motion will be refused and the injunction will be continued to the hearing.<sup>27</sup>

§ 1606. **Injunctions against the infringement of patents.** The same distinction has been recognized in the case of an injunction to restrain the infringement of a patent. Such an injunction is regarded as special in its nature, being granted upon notice to the opposite party and affidavits, and differing in this respect from the common injunction, which issues as a matter of course upon cause shown, and is usually dissolved as of course upon the coming in of the answer denying the equity of the bill. In patent cases, therefore, it is held that, on motion to dissolve, the presumptions arising from the answer may be disproved by evidence on the part of complainant, and that counter testimony is then admissible to sustain the answer.<sup>28</sup>

<sup>26</sup> *Bradford v. Peckham*, 9 R. I. 250. complainant's equity will not suffice to warrant a dissolution. *Peterson v. Matthis*, 3 Jones Eq., 31.

<sup>27</sup> *Purnell v. Daniel*, 8 Ired. Eq., 9; *Troy v. Norment*, 2 Jones Eq., 318; *Lloyd v. Heath*, Busb. Eq., 39. But the doctrine is hardly sustained by the weight of authority.

And it has even been held in cases of special injunctions for the prevention of irreparable injury, that the denial in the answer of <sup>28</sup> *Woodworth v. Rogers*, 3 Woodb. & M., 135; *Brooks v. Bicknell*, 3 McLean, 250.

§ 1607. **Introduction of affidavits as to new matter.** While new matter contained in the answer, which is not responsive to any allegations of the bill, will not, as a rule, be considered upon the hearing of a motion to dissolve,<sup>29</sup> yet, if defendant relies upon such new matter in support of his motion, complainant may be allowed to introduce affidavits for the purpose of contradicting it.<sup>30</sup> So an affidavit showing that the injunction was irregularly issued, and that the officer allowing it was misled or deceived as to the facts in the case, and thereby granted the injunction contrary to law, is admissible on the hearing of a motion to dissolve.<sup>31</sup> And in some states the question of the admissibility of affidavits upon the motion to dissolve depends upon whether they were filed before or after the coming in of the answer. Thus, it has been held that affidavits filed by complainant before answer may be read on the motion, but if filed after answer they can not be read.<sup>32</sup> The practice, however, upon this subject is so dependent upon the rules of practice and the statutes of different states, that no general rule can be devised susceptible of universal application.

§ 1608. **Objection as to insufficient security.** The objection that the security in the injunction bond was not approved by the court will not avail upon the final hearing, and can only be urged upon the motion to dissolve, since the only question upon the hearing is whether complainant is entitled to the relief prayed, and the question of whether the temporary injunction was properly or improperly awarded can not then be considered.<sup>33</sup>

§ 1609. **Practice on death of complainant.** Although legal proceedings usually abate by the death of a party to the action, yet an injunction, being in the nature of a judgment of the court, continues in force until dissolved by the court itself. And

<sup>29</sup> *Wooten v. Smith*, 27 Ga., 216.

And see *Lawrence v. Philpot*, *ib.*, 585.

<sup>30</sup> *Merwin v. Smith*, 1 Green Ch., 182.

<sup>31</sup> *Carroll v. Farmers Bank*, *Har- ring. (Mich.)*, 197.

<sup>32</sup> *Kinsler v. Clarke*, 2 Hill Eq., 617.

<sup>33</sup> *Boston v. Nichols*, 47 Ill., 353.

the proper practice upon the death of a complainant, after obtaining an injunction and before a hearing, is to apply to the court for a rule upon the administrator, or other representative of the deceased, to revive the action, or in default thereof that the injunction will be dissolved.<sup>34</sup> It follows, therefore, that upon the death of complainant before the hearing, defendant is not entitled to an immediate dissolution upon the coming in of his answer, no administration having yet been had upon complainant's estate, and he being unrepresented in the cause.<sup>35</sup> And in no event does the abatement of an injunction suit by the death of the complainant operate, *per se*, as a dissolution of the injunction, but an order of the court is required for that purpose.<sup>36</sup>

§ 1610. **Practice on death of defendant.** A similar practice prevails in case of the death of a defendant against whom an injunction has been obtained, and the court will grant a rule on complainant that the injunction shall stand dissolved unless renewed against the representatives of the deceased within a given period.<sup>37</sup> The rule, however, does not apply to the case of merely formal or nominal parties to the proceedings, and upon their death the cause may proceed without making their representatives parties to the record. And where defendant's answer is made and properly sworn to by him, but he dies before filing it, the answer may nevertheless be used on the hearing of a motion to dissolve the injunction.<sup>38</sup>

§ 1611. **Continuance of motion to dissolve.** Questions concerning the continuance of motions for dissolution may be regarded as subject to the exercise of a sound legal discretion. But since courts of equity are regarded as being always open

<sup>34</sup> *Hawley v. Bennett*, 4 Paige, 163; *Griffith v. Brough*, 1 Bland, 547; *Walsh v. Smyth*, 3 Bland, 9; *Carter v. Washington*, 1 Hen. & M., 203; *Jackson v. Arnold*, 4 Rand., 195.

<sup>35</sup> *Hill v. Jones*, 1 Murph., 211.

<sup>36</sup> *Collier v. Bank of Newbern*, 1 Dev. & Bat. Eq., 328.

<sup>37</sup> *White v. Fitzhugh*, 1 Hen. & M., 1. And see *Hawley v. Bennett*, 4 Paige, 163; *Cummins v. Cummings*, 4 Halst. Ch., 173.

<sup>38</sup> *Dennis v. Green*, 8 Ga., 197.

for the granting of preliminary injunctions, or to reinstate them after being improperly dissolved, an application to continue a motion for a dissolution will not be received with favor, and the continuance will only be granted upon a showing of the very gravest necessity.<sup>39</sup>

§ 1612. **Effect of sworn answer.** Although complainant may have waived defendant's answer under oath, yet if defendant, notwithstanding such waiver, files a sworn answer denying the equities of the bill, the injunction will be dissolved. And it may be said generally that the answer of defendant is entitled to the same credit as complainant's bill, so that the fact of the bill being sworn by several complainants, and the answer by only one of the defendants, constitutes no valid objection to the answer.<sup>40</sup>

§ 1613. **Multifariousness of bill; improper joinder of parties.** An objection to the injunction bill on the ground of multifariousness is held to be premature if taken on the motion to dissolve, and although such objection may be well founded, it is entitled to no weight upon the hearing of the motion.<sup>41</sup> An objection, however, for improper joinder of parties, although properly made in the first stages of the cause by demurrer and before answer, may be received even upon the motion to dissolve, and if the objection is one which the defendant has a right to take, the court is then bound to entertain it, and if it be valid, to dissolve the injunction.<sup>42</sup>

§ 1614. **Defective verification can not be remedied on motion to dissolve.** A defect in the verification of the bill can not be supplied upon the hearing of a motion to dissolve the injunction, since the granting of an injunction upon a bill thus

<sup>39</sup> Radford's Ex'rs v. Innes' Executrix, 1 Hén. & M., 8; Horn v. Perry, 11 West Va., 694; Pithole P. C. Co. v. Rittenhouse, 12 West Va., 313; Emmons v. Pidcock, 93 Va., 146, 24 S. E., 905. And see Steelsmith v. Fisher Oil Co., 47 West Va., 391, 35 S. E., 15.

<sup>40</sup> Manchester v. Dey, 6 Paige, 295. See also Lockhart v. City of Troy, 48 Ala., 579.

<sup>41</sup> Shirely v. Long, 6 Rand., 764.

<sup>42</sup> Hudson v. Maddison, 12 Sim., 416. See also Jones v. Garcia del Rio, Turn. & R., 297.

defective is not merely an irregularity, but an error to which the doctrine of waiver does not apply.<sup>43</sup> But if an injunction bill has been properly sworn, the fact that the officer administering the oath has neglected to sign the jurat does not constitute sufficient ground for dissolution.<sup>44</sup> And objections to the form and contents of an affidavit used in support of an answer upon motion to dissolve should be made in the court below, and will not be considered upon appeal to an appellate tribunal.<sup>45</sup>

§ 1615. **Filing of answer a waiver of objections to refusal of dissolution.** We have already seen that an injunction is to be implicitly obeyed until properly discharged, however irregular or erroneous the proceedings may have been in the first instance, and even though no sufficient ground existed for issuing the writ.<sup>46</sup> A distinction, however, is taken in the mode of procedure in obtaining the dissolution of injunctions irregularly issued, and those which are properly obtained. And while the usual practice in obtaining the dissolution of injunctions regularly issued is by a motion to dissolve, yet if the order for the injunction is irregular in the first instance, the proper practice is to move for the discharge of the order, and not for the dissolution of the injunction, since a motion to dissolve operates as a waiver of the irregularity.<sup>47</sup> And an order for an injunction irregularly obtained will not be sustained upon the merits of the case as disclosed on an application to discharge for irregularity.<sup>48</sup> But the irregularity in obtaining the injunction may be waived by the subsequent conduct of defendant, if such conduct amounts to a recognition and affirmance of the mandate of the court.<sup>49</sup> Upon the overruling of a motion to dissolve, de-

<sup>43</sup> *Perkins v. Collins*, 2 Green Ch., 476; *Angier v. May*, 3 W. R., 330; 482. *Williams v. Chicago Exhibition Co.*,

<sup>44</sup> *Capner v. Flemington Mining* 188 Ill., 19, 58 N. E., 611. *Co.*, 2 Green Ch., 467.

<sup>45</sup> *Prout v. Lomer*, 79 Ill., 331.

<sup>46</sup> See § 1416, *ante*.

<sup>47</sup> *Vipan v. Mortlock*, 2 Meriv.,

<sup>48</sup> *Brooks v. Purton*, 4 Beav., 494.

<sup>49</sup> *Vipan v. Mortlock*, 2 Meriv., 476. See *Travers v. Stafford*, 2 Ves. Sen., 20.

fendants, having filed their answer to the bill, can not assign the overruling of the motion as error. Such motion is regarded as in the nature of a demurrer to the bill, and the answer being in the nature of a plea, defendants by answering waive the previous demurrer, and can not afterward take advantage thereof.<sup>50</sup>

§ 1616. **Rule nisi, English practice.** It was the practice of the English Court of Chancery not to grant a motion to dissolve absolutely in the first instance, but to first grant a rule *nisi*; and when the rule *nisi* had been omitted the court would refuse to grant a motion to dissolve absolutely.<sup>51</sup> If defendant had pleaded to the bill instead of answering, it was regarded as improper to grant an order *nisi* upon the bill for a dissolution.<sup>52</sup> But where plaintiff had obtained an injunction until answer or further order, and defendant had interposed a plea to the entire bill, which plea was allowed on argument, it was held that defendant was entitled to a dissolution.<sup>53</sup>

§ 1617. **Rights of stranger to suit.** One who is not a party to the suit, but whose rights are affected by the injunction, may come in by petition and have the injunction construed or so modified as to preclude all risk of violating it by pursuing rights acquired previous to its being granted.<sup>54</sup>

§ 1618. **Final hearing.** It is held that when an injunction cause is submitted for final hearing upon bill, answer and depositions, as well as upon a motion to dissolve the interlocutory injunction, without objection by plaintiff, it is not error to dismiss the bill as well as to dissolve the injunction, if the record warrants such proceedings, even though the cause had not been formally set for hearing.<sup>55</sup>

<sup>50</sup> Craig v. The People, 47 Ill., 487.

<sup>51</sup> Raincock v. Young, 16 Sim., 566.

<sup>52</sup> Wroe v. Clayton, 10 Sim., 185.

<sup>53</sup> Philips v. Langhorn, Dick., 148.

<sup>54</sup> Speak v. Ransom, 2 Tenn. Ch., 210.

<sup>55</sup> Alford v. Moore's Adm'r, 15 West Va., 597.

## CHAPTER XXXIII.

### OF THE BOND AND DAMAGES.

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#### I. OF THE BOND.

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§ 1619. **Object of the bond.** The plaintiff in an injunction suit is usually required, as a condition precedent to obtaining an interlocutory injunction, to file a bond, with sufficient sureties, conditioned for the payment to defendant of all costs and damages that may accrue to him in the event of the injunction

being improperly issued. These bonds, being generally prescribed and regulated by statute, differ in different states, their general purpose and object, however, being everywhere the same, viz., to protect defendant from any wrongful interference with his rights, and to reimburse him for all damages and costs incurred by reason of an injunction improperly issued.

§ 1620. **Effect of the statute; discretion of court; injunction without bond not void; injunction should be denied without prejudice; cross bill; bond by receiver and attorney-general.** Where a statute requires the giving of a bond as a condition precedent to the granting of an injunction, the court is not at liberty to disregard such statute; and it is error, in such case, to grant the injunction without the required bond.<sup>1</sup> But the granting of a restraining order without the requisite bond does not render the order void, but is a mere irregularity which is cured by the subsequent granting of an injunction upon the filing of the proper bond.<sup>2</sup> And although an injunction should be refused or dissolved for failure to file the necessary bond, it should be without prejudice to plaintiff's right to renew his application upon presenting the proper obligation.<sup>3</sup> And the bond must be construed and governed by the statute in force at the time of its execution, and a statute then enacted, but which does not take effect until after such execution, can not have a retroactive operation so as to affect a bond given prior thereto, since the question is one which goes to the contract itself and not merely to the remedy thereon.<sup>4</sup> But in the absence of any statute prescribing the conditions of the bond, it rests in the discretion of the court to fix the terms upon which the relief may be granted, and where plaintiff gives such bond

<sup>1</sup> *Miller v. Parker*, 73 N. C., 58; *James v. Withers*, 114 N. C., 474, 19 S. E., 367. As to the necessity of first making a motion to vacate for failure to furnish the statutory bond, see *Oppermann v. Waterman*, 94 Wis., 583, 69 N. W., 569.

<sup>2</sup> *McKay v. Chapin*, 120 N. C., 159, 26 S. E., 701.

<sup>3</sup> *James v. Withers*, 114 N. C., 474, 19 S. E., 367.

<sup>4</sup> *Mix v. Vail*, 86 Ill., 40.



as is required by the court, and fails to prosecute his suit successfully, he is liable for all damages sustained by reason of the injunction.<sup>5</sup> And it has been held that where plaintiff's right is clear and the infraction of that right is satisfactorily established, no security need be required to protect defendant against such damages as may be incurred by reason of the injunction.<sup>6</sup> But the failure of plaintiff to give a bond to obtain a preliminary injunction which the court has awarded him will not prevent him from obtaining a perpetual injunction upon the final hearing of the cause.<sup>7</sup> Nor is a bond necessary where an injunction is granted upon final hearing.<sup>8</sup> But where the plaintiff has been compelled to file a bond as a condition to obtaining a preliminary injunction, and defendant thereupon files a cross bill asking for an injunction against plaintiff, such relief should not be allowed except upon the same terms as were imposed upon plaintiff, and defendant himself should therefore be required to file the proper obligation.<sup>9</sup> And where the plaintiff seeking an injunction is a receiver, his bond as such receiver will not be regarded as a sufficient protection to the defendant, and the fact that he is under such obligation will therefore not dispense with the statutory requirement of an injunction bond.<sup>10</sup> But under the practice in England, the attorney-general, suing for an injunction upon behalf of the crown, is not ordinarily

<sup>5</sup> *Newell v. Parte*, 10 Humph., 325. See as to bond required in Texas upon an injunction restraining the collection of money, *Foste v. Shephard*, 33 Tex., 687.

<sup>6</sup> *Dodd v. Flavell*, 2 C. E. Green, 255.

<sup>7</sup> *Harrison v. Board of Supervisors*, 51 Wis., 645, 8 N. W., 731. It is held, under the laws of West Virginia, that an injunction bond can not be required of an executor or administrator seeking to restrain the enforcement of a judg-

ment against him in his representative capacity, and that the bond, if given, will be treated as void, either as a statutory or common law obligation. *State v. Johnson*, 28 West Va., 56.

<sup>8</sup> *Lake Erie & W. R. Co. v. Clugish*, 143 Ind., 348, 42 N. E., 743.

<sup>9</sup> *Johnson v. Hall*, 83 Ga., 281, 9 S. E., 783.

<sup>10</sup> *Keeler v. White*, 10 Wash., 420, 38 Pac., 1134; *Cherry v. Western W. I. E. Co.*, 11 Wash., 586, 40 Pac., 136.

required to give an undertaking as a condition to securing an interlocutory injunction.<sup>11</sup>

§ 1621. **Order ineffectual till bond given; when bond operative; extends to all defendants.** An order for an injunction is considered ineffectual until the required bond is executed, and it has even been held that the order need not be regarded until the security is given.<sup>12</sup> But while the injunction is not usually allowed to take effect until the bond is given, yet if by inadvertence it is made to take effect before, it will not be reversed upon that ground.<sup>13</sup> And where the court directs the issuance of an injunction upon the plaintiff's executing a proper bond, an order dissolving a preliminary injunction will not be reversed where the record fails to show that any bond was executed.<sup>14</sup> The bond becomes operative and the obligation thereunder attaches from the time of filing it with the proper officer of the court.<sup>15</sup> And the protection afforded by the bond extends to all defendants in the injunction suit, regardless of whether they were served with process, provided they conform to the requirements of the injunction.<sup>16</sup>

§ 1622. **Insufficiency or irregularity of bond.** Insufficiency of the bond does not of itself constitute ground for a dissolution of the injunction in the first instance, but a reasonable time should be allowed for filing a new bond, the injunction meanwhile continuing in force.<sup>17</sup> Indeed, a motion to dissolve, based upon the inadequacy of the bond, would seem to be not well founded, when there is no suggestion that complainant is insolvent and unable to respond individually in damages, since it is always competent for the court to require additional security.<sup>18</sup>

<sup>11</sup> Attorney-General v. Albany Hotel Co., (1896) 2 Ch., 696, 65 L. J. N. S. Ch., 885.

<sup>12</sup> Pell v. Lander, 8 B. Mon., 554.

<sup>13</sup> Chesapeake & O. R. Co. v. Patton, 5 West Va., 234.

<sup>14</sup> Ricker v. Douglas, 75 Tex., 180, 12 S. W., 975.

<sup>15</sup> Lothrop v. Southworth, 5 Mich., 436.

<sup>16</sup> Cumberland Co. v. Hoffman Co., 39 Barb., 16.

<sup>17</sup> Beauchamp v. Supervisors, 45 Ill., 274; Gamble v. Campbell, 6 Fla., 347; Chesapeake & O. R. Co. v. Patton, 5 West Va., 234.

<sup>18</sup> Crawford v. Paine, 19 Iowa, 172.

'And where the writ is properly granted in other respects, it will not be reversed because the bond is for an insufficient sum, if the defendant is not injured thereby.<sup>19</sup> So when the court believes there is sufficient ground for retaining the injunction, and overrules a motion to dissolve, it is not error to permit additional security to be given.<sup>20</sup> Nor is the bond vitiated by the insertion of conditions which, although not required by law, are nevertheless not contrary to law, such conditions being regarded merely as surplusage.<sup>21</sup> So although the condition of the bond is less extensive than as required by the statute, yet if it contains a material part of the conditions required it will be held obligatory to the extent of such conditions.<sup>22</sup> But when the condition of the bond is broader than required by law, while the obligation may be held good to the extent that the condition accords with the statute, there can be no recovery beyond what would have been allowed had the condition been in accordance with the statute.<sup>23</sup>

§ 1623. **Judgment enjoined; sale of specific article.** Where the bond is conditioned for the payment of the judgment enjoined, the obligors will be held liable at law for this amount, although complainant may have been so far justified in resorting to equity as to preclude a decree against him for damages upon dissolving the injunction.<sup>24</sup> But where the purpose of the injunction is merely to restrain the sale of a specific article of property under execution, a bond given by one not a party to the judgment is considered in equity only as a security to the obligee for such injury as may actually accrue, and not for the whole amount of the debt, even though it be so conditioned.<sup>25</sup>

<sup>19</sup> *Drake v. Phillips*, 40 Ill., 388.

<sup>23</sup> *Menken v. Frank*, 57 Miss.,

<sup>20</sup> *Woolfolk v. Woolfolk*, 22 La. 732.  
An., 206.

<sup>24</sup> *Hunt v. Scobie*, 6 B. Mon.,

<sup>21</sup> *Johnson v. Vaughan*, 9 B. 469.  
Mon., 217; *Holliday's Ex'rs v. Myers*, 11 West Va., 276.

<sup>25</sup> *Hanley v. Wallace*, 3 B. Mon.,  
184.

<sup>22</sup> *Holliday's Ex'rs v. Myers*, 11  
West Va., 276.

§ 1624. **Consideration for bond; how far merits examined in action on.** The suspension and delay occasioned by an injunction are considered as a sufficient consideration, *prima facie*, for the bond.<sup>26</sup> But where, after the granting of a temporary restraining order, another order is entered requiring plaintiff to give bond, but the order fails to make the continuance of the restraining order conditional upon the giving of the bond, and a bond is thereupon given reciting merely that it is executed in consideration of the issuing of the restraining order, such bond is invalid for want of consideration, and an action can not be maintained upon it.<sup>27</sup> And in an action upon the bond the court will not examine the grounds on which the injunction was awarded, and will not inquire whether the writ was properly or improperly issued.<sup>28</sup> So it is no defense to an action upon the bond that the injunction which actually issued is broader than prayed for in the bill.<sup>29</sup> So in assessing damages upon the dissolution of an injunction restraining legal proceedings for the collection of a demand, where the person injured only seeks to recover his expenses in procuring the dissolution, it is not proper to go into evidence upon the merits of the proceeding which was restrained.<sup>30</sup> But in an action upon an injunction bond the obligors have been allowed to put in evidence the record of the action in which the bond was given, for the purpose of showing that the injunction was not dissolved upon the merits, but because of the pendency of another action in the same court between the same parties concerning the same subject-matter, and because the court was of opinion that the relief should have been sought in the original action, and not in an independent suit.<sup>31</sup>

<sup>26</sup> Mahan v. Tydings, 10 B. Mon., 351.

<sup>27</sup> Alaska Improvement Co. v. Hirsch, 119 Cal., 249, 51 Pac., 340.

<sup>28</sup> Dowling v. Polack, 18 Cal., 625. And see Cummings v. Mugge, 94 Ill., 186.

<sup>29</sup> Gibson v. Reed, 54 Neb. 309, 75 N. W., 1085.

<sup>30</sup> Andrews v. Glenville Woolen Co., 50 N. Y., 282.

<sup>31</sup> Stewart v. Miller, 1 Mont., 301. As to the right of the obligors in an injunction bond to show in a

§ 1625. **Second injunction against same judgment.** In an action upon a bond given to enjoin the enforcement of a judgment, the injunction having been dissolved and the bill dismissed, it constitutes no defense to the action that, after the dissolution of the former injunction, the judgment was again enjoined, and that the last action is still pending and undetermined; and a special plea of the pendency of another injunction against the same judgment is, therefore, no defense to the action upon the bond.<sup>32</sup> But in such case it is regarded as inequitable to permit the enforcement of the judgment upon the bond, although there was no legal defense to the action, and the judgment may, therefore, be enjoined.<sup>33</sup>

§ 1626. **Additional security; new bond.** In continuing an injunction a court of equity may require additional security, or a bond with new and enlarged conditions. And it may order the new bond to be given in place of the old and as a substitute for it, and the old bond may thereby be discharged without the consent of the obligee.<sup>34</sup> But if the order of the court be not substantially complied with, as where by mistake of the clerk the new bond is conditioned merely for the payment of the costs, the former bond is not discharged.<sup>35</sup> And if the bond, originally given be insufficient in amount it is proper to permit plaintiff to give a new bond before proceeding with the cause, although it is error to perpetuate the injunction upon condition of plaintiff executing another bond within a specified time.<sup>36</sup>

§ 1627. **Bond "on the usual terms;" obligors estopped.** When an injunction is granted against a judgment at law, the

suit upon the bond that the injunction was not in fact obtained, notwithstanding the recital in the bond, see *Adams v. Olive*, 57 Ala., 249. And in *Swan v. Timmons*, 81 Ind., 243, it is held that upon the trial of an action upon the bond, the record of a subsequent suit between the parties, wherein the injunction sought in the first action

was obtained is not admissible, either in bar of the action, or in mitigation of damages.

<sup>32</sup> *Weaver v. Poyer*, 73 Ill., 489.

<sup>33</sup> *Weaver v. Poyer*, 79 Ill., 417.

<sup>34</sup> *Kent v. Bierce*, 6 Ohio, 336.

<sup>35</sup> *Kent v. Bierce*, 7 Ohio, 2nd part, 209.

<sup>36</sup> *Downes v. Monroe*, 42 Tex., 307.

order of court directing that it be allowed "on the usual terms," it is to be regarded as granted upon the terms of giving a bond conditioned as prescribed by law. And the obligors in such bond, in an action brought thereon, are estopped from denying that the penalty of the bond conformed to the direction of the judge who awarded the injunction.<sup>37</sup>

§ 1628. **Statutes construed.** Under a statute providing that no injunction shall issue to stay "proceedings at law in a personal action after verdict or judgment," it is held that a suit at law instituted in another state, upon a judgment originally obtained in the former state, is not within the prohibition of the statute, and may be enjoined without the statutory bond; but the injunction should not go to the extent of restraining proceedings upon the judgment in the former state without the requisite security.<sup>38</sup> And where a statute provided that no injunction should issue to stay proceedings at law after verdict, unless the person applying therefor should enter into a satisfactory bond to the plaintiff in the action at law, conditioned to pay the debt enjoined, with interest and damages, the statute was held to be limited to cases where defendant in the judgment sought to restrain its enforcement; and when, in such case, a third person, not a party to the judgment, but a creditor of the same defendant, sought to enjoin the judgment creditor from obtaining an undue preference by his judgment, he was allowed the relief without bond.<sup>39</sup>

§ 1629. **Bond given in confederate states during rebellion.** In an action upon an injunction bond given in one of the confederate states during the rebellion, it is no defense to the bond that the chancellor under whose order it was given and the register who approved it and to whom it was payable were not legal officers, being officers of a government in rebellion against the United States, since the acts of such officers are not void.<sup>40</sup>

<sup>37</sup> *Harman v. Howe*, 27 Grat., 676.

<sup>39</sup> *Scarlett v. Hicks*, 13 Fla., 314.

<sup>38</sup> *Cairo & F. R. v. Titus*, 11 C. E.

<sup>40</sup> *Estis v. Prince*, 47 Ala., 269.

Green, 94.

§ 1630. **Failure to specify particular sum; recovery limited to penalty in bond.** An injunction bond is not void merely because it fails to specify any particular sum in which the obligors are bound, the undertaking in the bond being to indemnify defendant against all such damages as he may sustain by reason of the injunction.<sup>41</sup> But when an injunction is granted upon condition that a bond shall be filed in a given sum, which is done, and no further order is made as to the damages, defendants are limited in their recovery of damages to the amount of the penalty in the bond.<sup>42</sup>

§ 1631. **Delivery of bond for prosecution.** When the court has ordered that the injunction bond be delivered up to the obligees for prosecution, and they have instituted suit thereon, such order should not be rescinded except for good cause shown.<sup>43</sup>

§ 1632. **Enforcement of bond in equity.** A court of equity will not ordinarily entertain jurisdiction of an action to recover damages sustained by an injunction, when adequate relief may be had by an action at law.<sup>44</sup> But if the proceedings for the enforcement of the bond are had in equity, in a case in which the court properly has jurisdiction upon grounds of trust and the prevention of a multiplicity of suits, the court may distribute the proceeds in accordance with the rights and equities of all parties in interest, even though some of them are not named in the bond.<sup>45</sup>

§ 1633. **Validity not considered on appeal by principal.** Where damages are assessed upon the dissolution of an injunction, but the sureties in the bond do not appeal therefrom,

<sup>41</sup> North Carolina G. A. Co. v. North Carolina O. D. Co., 79 N. C., 48.

<sup>42</sup> Glover v. McGaffey, 56 Vt., 294; Nansemond Timber Co. v. Rountree, 122 N. C., 45, 29 S. E., 61. And see, *post*, § 1669.

<sup>43</sup> Brown v. Easton, 3 Stew., 725, reversing Easton v. New York & L. B. R. Co., *ib.*, 236.

<sup>44</sup> Ruble v. Coyote G. & S. M. Co., 10 Ore., 39.

<sup>45</sup> Oelrichs v. Spain, 15 Wal., 211.

the appeal being taken by the principal only, the validity of the bond will not be considered in the appellate court.<sup>46</sup>

§ 1634. **Approval; name of surety; trustee as obligor.** It is proper, although not absolutely essential, that the approval of the court or judge should be indorsed upon the bond, but it is not material that the name of the surety should appear in the body of the bond. And the fact that an obligor in the bond executes it in the capacity of trustee does not constitute any defense to an action brought thereon, but only affects the form of the judgment against such obligor.<sup>47</sup>

§ 1634 *a*. **When delay in prosecuting chancery cause no defense to action on bond.** In an action upon an injunction bond, defendant in the action will not be permitted to complain that plaintiff was guilty of delay in raising his defense in the equity case, as the result of which damages have accrued to defendant which he would otherwise not have suffered, where it appears that the complainant himself never made any effort to speed the chancery cause.<sup>48</sup>

<sup>46</sup> *Gibson v. O'Connell*, 30 Tex., 684.

<sup>48</sup> *Jones v. Allen*, 29 C. C. A., 318, 85 Fed., 523.

<sup>47</sup> *Griffin v. Wallace*, 66 Ind., 410.



## II. SURETIES.

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 1645. Surety concluded by assessment of damages against principal; surety bound by decree against principal.  
 1646. Receiver over personal property.  
 1647. Right of sureties to appeal.

§ 1635. **Liability of sureties strictly construed.** The liabilities and obligations of sureties upon injunction bonds are governed by the general law of contracts and are usually akin to those incurred by sureties upon other like obligations. There are, however, some features pertaining to this class of sureties which are deserving of especial notice. And, in the first place, it is to be observed that the undertaking of a surety in an injunction bond is one which is strictly construed, and his liability will not be extended by construction beyond the terms of the instrument.<sup>1</sup> When, therefore, the bond is given to two defendants who are enjoined, and is conditioned to pay them all such costs and damages as shall be awarded if the injunction is dissolved, there can be no recovery against the surety upon a dissolution of the injunction against one of the defendants only, it being still retained as to the other.<sup>2</sup> So the sureties are liable for such damages only

<sup>1</sup> *Ovington v. Smith*, 78 Ill., 250; 34 Miss., 257; *Edmison v. Sioux Webber v. Wilcox*, 45 Cal., 301; *Falls W. Co.*, 10 S. Dak., 440, 73 Hall v. Williamson's Adm'r, 9 N. W., 910.  
<sup>2</sup> *Ovington v. Smith*, 78 Ill., 250. And see *Smith v. Mutual Life & Mon.*, 28; *Tarpey v. Shillenberger*, 10 Cal., 390; *Anderson v. Falconer*, T. Co., 102 Ala., 282, 14 So., 625.

as result from the injunction itself, and not for damages caused by the unlawful act of the person obtaining the injunction during its pendency. They can not, therefore, be held liable for the value of the property in controversy which has been wrongfully disposed of by plaintiff in the injunction suit while the injunction was in force.<sup>3</sup>

§ 1636. **Illustrations of the doctrine.** In conformity with this tendency toward a strict construction of the undertaking of sureties upon this class of obligations, it is held when the bond is conditioned that the sureties shall be liable for such damages as may be sustained by reason of the injunction, if the court shall finally decide that plaintiff is not entitled thereto, that this liability will not be extended beyond a final decree in the lower court perpetuating the injunction, and will not warrant a recovery for costs and attorney fees accruing after that time.<sup>4</sup> So when the injunction is dissolved upon the hearing and judgment is given in favor of defendants, and plaintiff then appeals, the sureties upon the injunction bond are not liable for damages sustained in consequence of such appeal. And this is true even though, after the appeal is prayed, the court below orders the injunction to be continued until the decision of the appellate court, since such order is regarded as a new injunction, and the sureties are not liable for damages thereafter occurring; they can not, therefore, be held liable for counsel fees paid for arguing the case in the appellate tribunal.<sup>5</sup> So in the case of an

<sup>3</sup> *Cummings v. Mugge*, 94 Ill., 186. In South Dakota it is held, *Lambert v. Haskell*, 80 Cal., 611, 22 Pac., 327.

<sup>4</sup> *Town of Guilford v. Cornell*, 4 Ab. Pr., 220. Although the bond in this case was conditioned to pay such damages as defendants might sustain, "by reason of the said injunction, if this court should finally decide that the said plaintiff was not entitled thereto," it was held that the words "this

<sup>5</sup> *Webber v. Wilcox*, 45 Cal., 301;

injunction restraining proceedings under a judgment, although the statute requires a bond conditioned for the payment of the judgment, as well as damages and costs, yet if in fact the bond is taken for damages and costs only, the sureties will not be held beyond that for the amount of the judgment itself.<sup>6</sup> And where an order has been entered in a cause that an injunction issue upon the filing of a bond and the injunction was thereupon issued, while the bond was not filed until afterward, the sureties are not liable for damages resulting from the issuance of such injunction before the filing of the bond.<sup>7</sup>

§ 1637. **Estoppel against sureties; solvency of principal.** The sureties in an injunction bond are estopped from denying that the injunction recited in the bond was granted. Nor can they, in an action upon the bond, plead that an execution was sued out on the judgment enjoined, and satisfied by a levy before final decree in the injunction suit. And where the sureties are bound for the performance of such final decree as may be rendered against their principal, on the death of the complainant and the revival of the cause by his administrator they are equally bound for the satisfaction of whatever decree may be rendered against him.<sup>8</sup> Nor does the fact that the principal in the bond is solvent and able to meet his liabilities constitute any defense, in mitigation of damages or otherwise, to an action against the sureties.<sup>9</sup> Nor can the

court" were to be understood as if the words "the court" were used, and that the sureties were liable for the damages resulting from the injunction, although the final decision that plaintiff was not entitled to the writ was made by the appellate court. Where an injunction has been granted restraining a sheriff from paying over the proceeds of an execution sale of personalty, the sureties upon the bond are not released by an agreement

entered into between the principal obligor and the judgment creditor by which the sheriff is to retain the proceeds in his possession until the determination of a motion for a receiver. *Keith v. Henkleman*, 173 Ill., 137, 50 N. E., 692.

<sup>6</sup> *Ashby v. Tureman*, 3 Lit., 6; *Ferguson v. Tipton*, 1 B. Mon., 28.

<sup>7</sup> *Carter v. Mulrein*, 82 Cal., 167, 22 Pac., 1086, 16 Am. St. Rep., 98.

<sup>8</sup> *Fowler v. Scott*, 11 Ark., 675.

<sup>9</sup> *Hunt v. Burton*, 18 Ark., 188.

single surety upon a bond defend an action upon the bond upon the ground that the order of court required a bond with "sureties."<sup>10</sup>

§ 1638. **Parol evidence inadmissible; misrecital.** The contract of a surety upon an injunction bond is within the statute of frauds and is to be strictly construed; parol evidence is, therefore, not admissible to add to, vary, or contradict it in any of its terms. And while it has been held that a misrecital in the condition of the bond as to the amount of the judgment enjoined may be corrected by the bill, where the bond contains a plain reference to the bill, upon the principle of *id certum est quod certum reddi potest*,<sup>11</sup> yet the better doctrine seems to be that the liability of the surety is strictly limited to his undertaking, and that such misrecital can not be corrected.<sup>12</sup>

§ 1639. **Injunction against judgment; sale of personalty.** If the bond is conditioned that the obligor shall pay all sums of money, damages and costs which may be awarded against him in case the injunction is dissolved, the sureties are not liable for the amount of the judgment enjoined, if that be not adjudged against the obligor upon the dissolution.<sup>13</sup> And in an action upon a bond conditioned for the payment of all damages which the defendant might sustain because of the wrongful issuing of an injunction against a judgment, the surety is not liable for the amount of the judgment, where there is nothing to show that plaintiff has lost the opportu-

<sup>10</sup> Gyger v. Courtney, 59 Neb., 555, 81 N. W., 437.

<sup>11</sup> Williamson's Adm'r's v. Hall, 1 Ohio St., 190.

<sup>12</sup> Hall v. Williamson's Adm'r's, 9 Ohio St., 17.

<sup>13</sup> Corder v. Martin, 17 Mo., 41. In Jones v. Allen, 29 C. C. A., 318, 85 Fed., 523, a bond was given upon the granting of an injunction against the prosecution of an action at law, for the penal sum of

not to exceed \$7000. After the dissolution of the injunction, plaintiff procured judgment in the action at law for \$11,847.79, of which he made the sum of \$4975 by execution. It was held in an action upon the bond that plaintiff was entitled to judgment for the full penalty of \$7000 and that defendant could not credit against this the sum of \$4975 which had been collected upon execution.

nity of collecting it by reason of the injunction.<sup>14</sup> Nor will a misrecital in the bond as to the terms of the injunction and its extent subject the surety to payment of judgments at law, if from the injunction it appears that the collection of the judgments was not enjoined.<sup>15</sup> And although a statute authorizes damages to be assessed upon the amount of money enjoined, upon the dissolution of an injunction restraining the collection of money, yet upon the dissolution of an injunction against a sale of personal property under execution it is error to render judgment upon motion against plaintiff and his sureties upon the bond for the value of the property and damages thereon, when the sureties have only undertaken to pay such damages as may be sustained by the wrongful issuing of the writ.<sup>16</sup>

§ 1640. **General doctrine further illustrated; modification of injunction.** The sureties in the bond are entitled to stand upon the precise terms of the contract, and their liability will not be extended beyond its terms. When, therefore, the bond is conditioned for the payment of such damages as shall be awarded against the principal by reason of issuing the injunction, an action can not be maintained against the sureties when it is not averred that any damages were so awarded.<sup>17</sup> So if the bond is conditioned for the payment of such costs and damages as may be recovered against the principal for the wrongful suing out of the injunction, there can be no recovery upon the bond when it is not alleged that there has been a recovery against the principal for wrongfully suing out the injunction.<sup>18</sup> But a modification of an injunction which in no way affects or enlarges the liability of the sureties upon the bond will not release them

<sup>14</sup> Neal v. Taylor, 56 Ark., 521, 20 S. W., 352.

<sup>15</sup> Hord v. Trimble, 1 Lit., 413.

<sup>16</sup> Ferguson v. Herring, 49 Tex., 126.

<sup>17</sup> Tarpey v. Shillenberger, 10 Cal., 390; Anderson v. Falconer, 34 Miss., 257. And see State v. Hall,

40 West Va., 455, 21 S. E., 760.

<sup>18</sup> Dunn v. Davis, 37 Ala., 95.

from their obligation upon a final dissolution of the injunction as modified.<sup>19</sup>

§ 1641. **Sureties can not go behind decree; their liability not altered by stipulation of the parties.** In an action upon an injunction bond the sureties will not be permitted to go behind the final decree in the injunction suit and to assail the validity of an agreement upon which that decree was founded.<sup>20</sup> Nor, upon the other hand, is it competent for the parties to an injunction suit, by a stipulation made between themselves, to alter or vary the liability of the sureties upon the injunction bond.<sup>21</sup>

§ 1642. **Remedy against surety by suit on bond.** The appropriate means of enforcing the liability of a surety upon an injunction bond is by an action at law upon the bond, unless otherwise provided by statute. And in the absence of statutory authority a court of equity has no jurisdiction over the sureties upon such bonds, and can not render judgment against them upon dissolving the injunction, even though the court is authorized by statute to render judgment against the principal in the bond upon a dissolution of the injunction.<sup>22</sup>

§ 1643. **The Louisiana practice.** In Louisiana, however, the surety upon the bond is treated as a party to the suit in which the injunction is granted.<sup>23</sup> And it would seem that,

<sup>19</sup> *Brackebush v. Dorsett*, 138 Ill., 167, 27 N. E., 934.

<sup>20</sup> *Oelrichs v. Spain*, 15 Wal., 211. And see as to the effect of the final decree in the injunction suit upon the sureties who have signed the bond in that suit, *Towle v. Towle*, 46 N. H., 431.

<sup>21</sup> *Mix v. Vail*, 86 Ill., 40.

<sup>22</sup> *Bailey v. Gibson*, 29 Ark., 472; *Clayton v. Martin*, 31 Ark., 217; *Spencer v. Sherwin*, 86 Iowa, 117, 53 N. W. 86. But under a statute of Missouri it is held that judgment may be rendered against the sureties upon an injunction bond

by a motion to assess damages. *Fears v. Riley*, 147 Mo., 453, 48 S. W., 828. But a statute providing that upon the dissolution of an injunction the court should immediately enter up judgment against the sureties as well as principal in the bond has been held unconstitutional and void. *Hughes v. Hughes' Adm'r*, 4 Monr., 43.

<sup>23</sup> *Green v. Huey*, 23 La. An., 704. See *Verges v. Gonzales*, 33 La. An., 410; *Union Bethel Church v. Civil Sheriff*, 33 La. An., 1461.

under the practice in that state, it is proper upon dissolving the injunction to give judgment for damages against the plaintiff in the injunction suit and the surety upon his bond in the same proceeding and without a new action for that purpose.<sup>24</sup> Where, however, damages are awarded upon dissolution against the principal alone and not against the surety, and execution is thereupon issued against the surety, he may enjoin the enforcement of such execution.<sup>25</sup>

§ 1644. **The New York doctrine; sureties concluded by reference.** Under the New York practice it is held that the sureties in the bond, who have undertaken, if the court shall finally decide that plaintiff is not entitled to the injunction, to pay such damages as shall be ascertained by reference or otherwise as the court may direct, are concluded by a reference made to determine the damages which is duly confirmed by the court, even though the sureties were not notified of or heard upon the assessment of damages on such reference. The undertaking of the sureties, in such case, is held to be absolute to pay such damages as may be assessed, and in the absence of collusion they can not, in an action upon the bond, go behind the judgment for damages rendered upon such reference in the original suit.<sup>26</sup> And it is held that a surety desiring to show fraud in the execution of the bond can only do so in an action upon the bond itself, and not upon a motion to open the assessment of damages.<sup>27</sup> But such assessment of damages may be set aside because of fraud in procuring the assessment.<sup>28</sup>

§ 1645. **Surety concluded by assessment of damages against principal; surety bound by decree against principal.** Where

<sup>24</sup> *Mora v. Avery*, 22 La. An., 417. sary in such cases, it is regarded as the fairer and safer course.

<sup>25</sup> *Frantz v. Waggaman*, 28 La. An., 514. *Jordan v. Volkenning*, 72 N. Y., 300.

<sup>26</sup> *Methodist Churches v. Barker*, 18 N. Y., 463; *Poillon v. Volkenning*, 11 Hun, 385. But while notice to the sureties is not neces- <sup>27</sup> *Bray v. Poillon*, 4 Thomp. & C., 663.

<sup>28</sup> *Jordan v. Volkenning*, 72 N. Y., 300.

the undertaking of the surety is to pay all such costs and damages as shall be awarded against the plaintiff in the event of a dissolution of the injunction, and the injunction is dissolved and damages are assessed in the same action in accordance with the law of the state, such decree is conclusive against the surety as to the amount of damages in an action upon the bond, and that amount may properly be recovered against him in such action.<sup>29</sup> And in an action against a surety upon an injunction bond, in the absence of fraud or collusion in obtaining a decree dismissing plaintiff's bill and dissolving the injunction, the surety, although not a party to the injunction action, is conclusively bound by the decree as to the wrongfulness of the injunction and as to the breach of the condition of the bond, and the decree in that case is admissible in evidence against the surety, the only question being as to the amount of the damages sustained.<sup>30</sup>

§ 1646. **Receiver over personal property.** In an action concerning the title to personal property, when plaintiff obtains an injunction against its sale, and is himself appointed receiver over the property, *pendente lite*, but his bill is afterward dismissed for want of equity, it is error to render a decree against plaintiff and his sureties in the injunction bond for the value of the property; since the receiver and the sureties upon his bond are liable for the value of the property, the principal and sureties upon the injunction bond being only answerable for the damage resulting from the wrongful issuing of the injunction.<sup>31</sup>

§ 1647. **Right of sureties to appeal.** The sureties upon the bond who are not parties to the suit in which the injunction is obtained can not appeal from the judgment in that suit, since they are not parties to that judgment; and until proceedings are had against them upon the bond, they have no such

<sup>29</sup> *McAllister v. Clark*, 86 Ill., Read, 86 Iowa, 136, 53 N. W., 96. 236.

<sup>31</sup> *Harvey v. Berry*, 1 Baxt., 252.

<sup>30</sup> *Shenandoah National Bank v.*



interest as to warrant them in carrying on the original suit by appeal.<sup>32</sup> But where under the practice of the state damages are assessed upon dissolving an injunction in the same proceeding, if the sureties upon the bond have been notified of such assessment and have been heard thereon and damages have been awarded against them, they are entitled to an appeal from such order, although they are not strictly parties to the injunction suit. Such assessment being conclusive upon them, unless impeached for fraud, they have sufficient interest to entitle them to an appeal.<sup>33</sup> And when separate appeals are taken by the principal and surety in the bond from a judgment rendered against them upon the dissolution of the injunction, the principal in that bond, if otherwise satisfactory, may properly become the surety in the appeal bond upon the appeal taken by his own surety.<sup>34</sup>

<sup>32</sup> *St. Louis Zinc Co. v. Hessel-meyer*, 50 Mo., 180. But in Louisiana it is held that the surety is a necessary party to an appeal in the injunction suits. *Avegno v. Johnston*, 22 La. An., 400. And when the appeal is taken by plaintiff in the injunction suit it is considered

as embracing his sureties with him, and the appeal will not be dismissed because the sureties have not been formally joined. *Lane v. Roselius*, 23 La. An., 258.

<sup>33</sup> *Hotchkiss v. Platt*, 7 Hun, 56.

<sup>34</sup> *State v. Judge of Seventh District Court*, 22 La. An., 262. \*

## III. RIGHT OF ACTION.

## § 1648. Common law remedy.

1649. When right of action accrues; statute of limitations; parties; appeal; partial dissolution.

1649a. Dismissal of action; death of defendant; death of plaintiff; consent of defendant.

1649b. When right of action does not accrue upon dismissal.

1650. Injunction must actually issue; no action when cause for injunction removed.

1651. Injunction against judgment; reinstating injunction.

1652. Merits of injunction suit; want of jurisdiction.

1653. Averment of breach.

1654. Disobedience to writ no defense to action.

1655. Imposition upon the court.

1656. Doctrine of the United States courts.

§ 1648. **Common law remedy.** Some conflict of authority exists as to whether a defendant in an injunction suit may, by an action on the case, recover damages for having been enjoined without cause, and the rule has been broadly stated that no such right of action exists, and that his only remedy is by suit upon the injunction bond.<sup>1</sup> The better doctrine, however, seems to be that defendant's right of action at common law is not merged in the remedy upon the bond, and that an action on the case will lie.<sup>2</sup> But to support such action, the plaintiff's pleadings must clearly negative the existence of probable cause for the injunction; it will not suffice to allege that the writ was unjustly and wrongfully sued out, but there must be distinct allegations of malice or a want of probable cause.<sup>3</sup>

<sup>1</sup> *Gorton v. Brown*, 27 Ill., 489; *Hayden v. Keith*, 32 Minn., 277. Y., 306, 31 N. E., 1099, 18 L. R. A., 275; *Short v. Spragins*, 104 Ga., 628, 30 S. E., 810; *Asevado v. Orr*, 100 Cal., 293, 34 Pac., 777. See also *Keber v. Mercantile Bank*, 4 Mo. App., 195; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App., 505. And see the last case

<sup>2</sup> *Cox v. Taylor's Adm'r*, 10 B. Mon., 17; *Mitchell v. Southwestern Railroad*, 75 Ga., 398.

<sup>3</sup> *Cox v. Taylor's Adm'r*, 10 B. Mon., 17; *Manlove v. Vick*, 55 Miss., 567; *Mark v. Hyatt*, 135 N.

§ 1649. **When right of action accrues; statute of limitations; parties; appeal; partial dissolution.** The general rule is, that upon the dissolution of an injunction and failure on the part of the obligors to comply with the conditions of the bond, a right of action at once accrues.<sup>4</sup> Nor is it necessary that the obligee should first sue out an execution upon the decree dissolving the injunction, before instituting proceedings at law for a recovery upon the bond, but he may proceed immediately upon the dissolution.<sup>5</sup> But if the bond is conditioned for the payment of such damages as may be sustained if the court shall finally decide that plaintiffs were not entitled to the injunction, no right of action accrues until the final determination of the suit,<sup>6</sup> and the statute of limitations does not begin to run upon the bond until that time.<sup>7</sup> The action is properly brought in the name of all the joint obligees, although it be in fact only for an injury or loss occasioned to one of them.<sup>8</sup> In fact, where the obligation is joint, the action must be brought in the name of all the joint obligees, even though some of them have no interest in the subject-matter of the injunction suit and have not suffered any damage by reason of the injunction.<sup>9</sup> It has been held,

cited for the distinction between the common law action and the action upon the bond. In North Carolina, under the provisions of the code, it would seem unnecessary to allege want of probable cause to recover damages for the wrongful suing out of an injunction. *Crawford v. Pearson*, 116 N. C., 718, 21 S. E., 561.

<sup>4</sup> *Tallahassee R. R. Co. v. Hayward*, 4 Fla., 411; *Sizer v. Anthony*, 22 Ark., 465; *French P. & O. Co. v. Porter*, 134 Ala., 302, 32 So., 678, 92 Am. St. Rep., 31; *Keith v. Henkleman*, 173 Ill., 137, 50 N. E., 692.

<sup>5</sup> *Sizer v. Anthony*, 22 Ark., 465.

<sup>6</sup> *Dougherty v. Dore*, 63 Cal., 170; Supreme Court of I. O. O. F. v. Supreme Court, 94 Wis., 234, 68 N. W., 1011.

<sup>7</sup> *Dougherty v. Dore*, 63 Cal., 170.

<sup>8</sup> *Watts v. Sanders*, 10 B. Mon., 372.

<sup>9</sup> *Montana Mining Co. v. St. L. M. & M. Co.*, 19 Mont., 313, 48 Pac., 305. In this case it was held that an action upon the bond could be maintained in a state court notwithstanding the fact that the bond had been given in an injunction action brought in the federal court.

however, that no action at law can be maintained upon the bond until the final determination of the cause in which the injunction issued,<sup>10</sup> even though it has been dissolved upon appeal and the cause remanded for further proceedings, since complainant is still entitled to proceed with his action, and may on final hearing establish his right to an injunction.<sup>11</sup> And an injunction obtained by the plaintiff in an action at law to preserve property *pendente lite* being dissolved, it is held that no reference should be allowed to ascertain damages sustained by defendant by reason of the injunction until the suit at law is determined, since it can not be known until the action is determined whether the plaintiff may not recover in the action at law.<sup>12</sup> So where an appeal is taken from a judgment dissolving a temporary injunction, which is thereupon affirmed, damages are properly assessable upon the final determination of the appeal and not at the time of the rendition of the judgment of dissolution.<sup>13</sup> But where an injunction is the sole relief sought by the bill, and a temporary injunction is dissolved and the bill dismissed for want of equity, the case is at an end and it is proper to allow damages upon such dissolution.<sup>14</sup> And the condition of the bond may be broken by a dissolution of the injunction in part, as well as by a total dissolution; and a right of action may accrue, although the injunction has not been wholly dissolved, provided the decree for a partial dissolution is a final decree disposing of the cause.<sup>15</sup> And al-

<sup>10</sup> Bemis v. Gannett, 8 Neb., 236; see Crawford v. Pearson, 116 N. Browne v. Edwards & McC. L. Co., C., 718, 21 S. E., 561.

44 Neb., 361, 62 N. W., 1070; Johnson v. Bouton, 56 Neb., 626, 77 N. W., 57; Bank of Monroe v. Gifford, 13 Raleigh & W. Ry. Co. v. G. & G. M. & M. Co., 117 N. C., 191, 23 S. E., 181.

65 Iowa, 648, 22 N. W., 913; Brown v. Galena M. & S. Co., 32 Kan., 528, 4 Pac., 1013. <sup>14</sup> Derdeyn v. Donovan, 81 Miss., 696, 33 So., 652.

<sup>11</sup> Gray v. Veirs, 33 Md., 159; 68; Walker v. Pritchard, 135 Ill., Penny v. Holberg, 53 Miss., 567. 103, 25 N. E., 573, 11 L. R. A.,

<sup>12</sup> Thompson v. McNair, 64 N. 577; Brackebush v. Dorsett, 138 C., 448. And to the same effect, Ill., 167, 27 N. E., 934; Lambert

though the suit has been dismissed in the court below, no action can be maintained upon the bond while an appeal remains pending and undetermined from such decree.<sup>16</sup> So if by the final decree the injunction is continued until the performance of a particular act, no action can be maintained upon the bond until such act has been performed.<sup>17</sup> But an order of reference for the ascertainment of damages, although prematurely entered upon the dissolution of a preliminary injunction, will not be disturbed on appeal where it is held that the injunction was properly dissolved for want of equity upon the face of the bill.<sup>18</sup>

§ 1649 *a*. **Dismissal of action; death of defendant; death of plaintiff; consent of defendant.** The voluntary dismissal of an injunction suit by the plaintiff, after obtaining an interlocutory injunction and giving a bond, is regarded as such a judicial determination of the controversy and as such a breach of the condition as to warrant a right of action upon the bond.<sup>19</sup> And in such case a recovery may be had for the expenses act-

*v. Alcorn*, 144 Ill., 313, 33 N. E., 53, 21 L. R. A. 611. Section 8 of Chapter 69 of the Revised Statutes of Illinois provides that where the injunction is against the collection of a judgment, damages may be awarded "if the injunction be dissolved in whole or in part." Section 12 of the same act provides that "in all cases where an injunction is dissolved by any court of chancery," damages may be assessed and awarded. It is held that Section 12 was not intended to limit the action of the court in awarding damages to cases where the injunction was wholly dissolved, and that damages are recoverable where the dissolution is only partial. *Walker v. Pritchard*, 135 Ill., 103, 25 N. E., 573, 11 L. R. A., 577.

<sup>16</sup> *Cohn v. Lehman*, 93 Mo., 574, 6 S. W., 267.

<sup>17</sup> *Shackelford v. Smith*, 61 Miss., 5.

<sup>18</sup> *Avery v. Ryan*, 74 Wis., 591, 43 N. W., 317.

<sup>19</sup> *Swan v. Timmons*, 81 Ind., 243; *Richardson v. Allen*, 74 Ga., 719; *Mitchell v. Sullivan*, 30 Kan., 231, 1 Pac., 518; *Tullock v. Mulvane*, 61 Kan., 650; *Asevado v. Orr*, 100 Cal., 293, 34 Pac., 777; *Frahm v. Walton*, 130 Cal., 396, 62 Pac., 618; *Nielsen v. City of Albert Lea*, 87 Minn., 285, 91 N. W., 1113; *Alliance Trust Co. v. Stewart*, 115 Mo., 236, 21 S. W., 793; *Gyger v. Courtney*, 59 Neb., 555, 81 N. W., 437; *Nansemond Timber Co. v. Rountree*, 122 N. C., 45, 29 S. E., 61; *Canadian & A. M. & T. Co. v. Fitzpatrick*, 71 Miss., 347, 14 So., 270.

ually incurred in resisting the motion for the injunction, including counsel fees.<sup>20</sup> So when plaintiff, after service of the writ, himself procures an order vacating and discharging it, and afterward and without defendant's consent procures an order discontinuing his action, defendant is thereupon entitled to an assessment of damages upon the undertaking.<sup>21</sup> And when the bond is conditioned to pay such damages as may be sustained if it is finally decided that the injunction should not have been granted, a right of action accrues upon the dismissal of the suit, that being regarded as a judicial determination that the injunction should not have been granted.<sup>22</sup> So an order dissolving an interlocutory injunction after a hearing upon pleadings and affidavits and the subsequent dismissal of the action for the want of prosecution constitute such a final determination that plaintiff was not entitled to the injunction as to warrant an assessment of the damages sustained by defendants.<sup>23</sup> And the dismissal of a bill after a hearing upon pleadings and evidence operates as an adjudication that the injunction was wrongfully issued, even though the dismissal is without prejudice.<sup>24</sup> But where, after the granting of a preliminary injunction, the matters in dispute have been by agreement submitted for final decision to a board of arbitrators, who thereupon find for the defendant and award that the bill be dismissed, and in pursuance thereof, the bill is dismissed and the injunction dissolved, such award is not such an adjudication that plaintiff was not entitled to the injunction as will enable the defendant to maintain an action upon the bond.<sup>25</sup> And when the action abates by the death of the defendant, there never having been a judicial determination that plaintiff

<sup>20</sup> *Swan v. Timmons*, 81 Ind., 243.

<sup>21</sup> *Pacific Mail S. Co. v. Toel*, 85 N. Y., 646.

<sup>22</sup> *Pugh's Adm'r v. White*, 78 Ky., 210.

<sup>23</sup> *Kane v. Casgrain*, 69 Wis., 430.

<sup>24</sup> *Yale v. Baum*, 70 Miss., 225, 11 So., 879.

<sup>25</sup> *Columbus, H. W. & T. Ry. Co.*

*v. Burke*, 54 Ohio St., 98, 43 N. E., 282.

was not entitled to the injunction, the cause of action not being one which survives, no damages can be assessed as for the dissolution of the injunction.<sup>26</sup> But where, before the hearing of the injunction suit upon the merits, plaintiff dies, and no effort is made by his personal representatives to continue the action, and the time in which it could be revived has elapsed, and the court thereupon enters an order of dismissal, such order operates as a termination of the suit and an action may be maintained against the surety upon a *superseas* bond which had been given to keep in force a temporary injunction pending the final determination of the action.<sup>27</sup> But where the voluntary dissolution of an injunction by the plaintiff is with the consent of the defendant, he waives his rights under the bond and can not afterward maintain an action upon the bond upon the ground that the injunction was wrongfully granted.<sup>28</sup>

§ 1649 *b*. **When right of action does not accrue upon dismissal.** Where a defendant secures the dismissal of an injunction action and the dissolution of a preliminary injunction upon a matter which arises subsequent to the commencement of the action and which has no bearing directly or indirectly upon the merits of the injunction suit, such dismissal is not such a final adjudication by the court that plaintiff was not entitled to the injunction as will give a right of action against the sureties upon a bond conditioned for the payment of such damages as may be sustained by the defendant if the court should finally decide that the plaintiff was not entitled to the injunction. Thus, where, upon the application of the defendant, made after the commencement of the injunction suit, to have plaintiff punished for contempt in interfering to prevent the execution of a commission to take testi-

<sup>26</sup> *Johnson v. Elwood*, 82 N. Y., 362.

<sup>27</sup> *Humfeldt v. Moles*, 63 Neb., 448, 88 N. W., 655.

<sup>28</sup> *Columbus, H. V. & T. Ry. Co. v. Burke*, 54 Ohio St., 98, 43 N. E., 282.

mony issued upon defendant's application, an order was entered adjudging plaintiff guilty as charged and directing as punishment that the bill be dismissed and the temporary injunction dissolved, the dismissal of the action and the dissolution of the injunction based upon such order is not such an adjudication of the wrongfulness of the injunction at the time it was granted as will enable defendants to maintain an action upon the bond against the sureties.<sup>29</sup>

§ 1650. **Injunction must actually issue; no action when cause for injunction removed.** Until the writ of injunction is issued and the defendant is actually restrained thereby no cause of action can exist on the bond, although it has been duly approved and filed.<sup>30</sup> And where an injunction is ordered, but not yet issued, upon condition of complainant giving bond with sufficient security, with which condition he fails to comply, it is error to decree damages against him as upon a dissolution.<sup>31</sup> And where a bond is conditioned for the payment of all damages resulting from the issuing of an injunction pending the hearing of the action, there is no liability for damages resulting from the issuing of a mere restraining order granted until the hearing of a motion to show cause why a temporary injunction should not issue, such motion itself being denied and the injunction pending the hearing being refused.<sup>32</sup> Nor can there be any recovery upon a bond conditioned that complainant will prosecute the injunction suit with effect, in a case where, at the time of filing the bill, there was sufficient ground for the injunction, which is afterward removed and the injunction is dissolved, since complainant is regarded in such case as having prosecuted his action with effect.<sup>33</sup> And where an interlocutory injunction is obtained upon giving the

<sup>29</sup> *Apollinaris Co. v. Venable*, 136 N. Y., 46, 32 N. E., 555.

<sup>30</sup> *Eakle v. Smith*, 27 Md., 467.

<sup>31</sup> *McCoun v. Delany*, 2 Bibb, 440.

<sup>32</sup> *Byam v. Cashman*, 78 Cal.,

<sup>33</sup> *Watts v. Sanders*, 10 B. Mon., 372; *Butchers U. & S. H. Co. v.*

*Howell*, 37 La. An., 280. And see

*Burroughs v. Jones*, 79 Miss., 214,

28 So., 944.

525, 21 Pac., 113.



statutory bond required, but the action is finally discontinued by agreement of the parties because of a change in affairs resulting from an act of legislature passed during the pendency of the action, it is improper to award an order of reference to assess damages by reason of the injunction, since there has been no judicial determination of the merits, or of plaintiff's right to the injunction when obtained.<sup>34</sup>

§ 1651. **Injunction against judgment; reinstating injunction.** When a judgment at law is enjoined upon a bond conditioned for the payment of the judgment, with all costs and damages that may be awarded in the event of a dissolution, the right of action upon the bond becomes complete upon final dissolution of the injunction, since that is the contingency upon which the bond is forfeited. It is not necessary, therefore, in such case that the judgment creditor should first pursue his remedy by enforcing his judgment, before resorting to an action upon the bond.<sup>35</sup> And in an action upon such bond, after final dissolution of the injunction, it affords no defense that the judgment which was enjoined has been subsequently reversed as to one of the judgment debtors, but affirmed as to the other.<sup>36</sup> But where an injunction has been dissolved and afterward reinstated, no action will lie upon the bond as for a breach of its conditions, since the new injunction is regarded as but a continuation of the same cause.<sup>37</sup> And when a bond given in an action to enjoin a judgment at law is conditioned for payment or satisfaction of the amount of the judgment, and upon dissolution of the injunction the judgment creditor takes the body of his debtor in execution, thereby satisfying the judgment, this operates as a bar to any recovery upon the bond.<sup>38</sup> And an injunction against the sale of a particular piece of prop-

<sup>34</sup> *Palmer v. Foley*, 71 N. Y., 106.

<sup>36</sup> *Somerville v. Mayes*, 54 Miss.,

<sup>35</sup> *Harrison v. Balfour*, 5 Sm. & Mar., 301.

31.

<sup>37</sup> *Bentley v. Joslin*, Hemp., 218.

<sup>38</sup> *Porteous v. Snipes*, 1 Bay, 215.

erty under a judgment is not an injunction against the enforcement of the judgment. Accordingly damages can not be assessed upon the dissolution of such injunction under a statute authorizing the assessment of damages upon the dissolution of an injunction enjoining the enforcement of a judgment.<sup>39</sup>

§ 1652. **Merits of injunction suit; want of jurisdiction.** In an action upon an injunction bond after dissolution, matters which go to the merits of the injunction suit are not properly admissible as a defense to the action.<sup>40</sup> So in a suit upon a bond conditioned for payment of the judgment enjoined the obligors will not be allowed to defend upon the ground that there were sufficient equities to warrant the injunction.<sup>41</sup> So

<sup>39</sup> *Stanley v. Bonham*, 52 Ark., 354, 12 S. W., 706.

<sup>40</sup> *Sipe v. Holliday*, 62 Ind., 4; *Terre Haute & Indianapolis R. Co. v. Peoria & Pekin Union R. Co.*, 182 Ill., 501, 55 N. E., 377; *Nansemond Timber Co. v. Rountree*, 122 N. C., 45, 29 S. E. 61; *Fullerton v. Pool*, 9 Wyo., 9, 59 Pac., 431.

<sup>41</sup> *Hughes' Adm'r v. Wickliffe*, 11 B. Mon., 202. But under the Code of procedure of North Carolina, which requires a bond conditioned for the payment of such damages to the person enjoined "as he may sustain by reason of the injunction if the court shall finally decide that the plaintiff was not entitled thereto," it is held that damages can not be assessed upon such bond after dissolution for losses incurred by defendant, when the action was brought and prosecuted by plaintiff in good faith, and that damages can be allowed only upon showing a want of probable cause for the plaintiff's action. *Burnett v. Nicholson*, 79 N. C., 548. So in

New Jersey, under a rule of court requiring a bond conditioned to pay to the person enjoined "such damages as he may sustain by reason of the injunction, if the court shall eventually decide that the complainant was not equitably entitled to such injunction," it is held that a bond given under such rule is security for damages only in case complainant shall prove not to have been equitably entitled to the injunction when applied for. That the injunction was dissolved upon answer is not, therefore, evidence that plaintiff was not equitably entitled to it, and does not necessarily entitle defendant to an assessment of damages upon the bond. *Smith v. Kuhl*, 11 C. E. Grene, 97. So where plaintiff made out a proper case for the granting of a preliminary injunction, which was granted upon the filing of a bond conditioned for the payment of any and all damages which defendant might suffer if it should finally be determined that plaintiff

want of jurisdiction in the court or officer granting an injunction constitutes no valid defense to an action upon the bond or to an assessment of damages after a dissolution.<sup>42</sup> And an action may be maintained upon the bond although the bill for injunction was dismissed for want of prosecution.<sup>43</sup> And where an injunction has been allowed to restrain proceedings under a judgment, while the want of jurisdiction in the court granting the writ may render the obligation void as a statutory bond, it will still be held good as a common law obligation, the obligor having voluntarily given the undertaking and delayed the enforcement of the judgment.<sup>44</sup>

§ 1653. **Averment of breach.** When the bond is conditioned to pay such damages as are sustained by the injunction, if it shall be finally decided that it ought not to have been granted, an averment in an action upon the bond that it was determined by the court that the bill did not contain a statement of facts sufficient to justify the injunction, and that the same was then and there dissolved, has been held a sufficient

was not entitled to the injunction, it was held defendant was not entitled to damages upon the dissolution of the injunction, where the case made out by plaintiff upon the application for the writ was one which properly required its issuance to hold matters *in statu quo*. *Coosaw Mining Co. v. Carolina Mining Co.*, 75 Fed., 860. But see *Green v. Philadelphia F. & G. Co.*, 11 C. E. Green, 443. But in *Boden v. Dill*, 58 Ind., 273, it is held that when the bond is conditioned for the payment of all damages and costs sustained by the obligee by reason of the injunction should the same be wrongful, the only condition upon which the bond becomes operative

is that the injunction is wrongful; and a dissolution is *prima facie* evidence of this fact, and the undertaking then becomes absolute. And in the same case it is held that the bond inures to the benefit of all the defendants enjoined, although but one of them is named therein.

<sup>42</sup> *Hanna v. McKenzie*, 5 B. Mon., 314; *Stevenson v. Miller*, 2 Lit., 306; *Walton v. Develing*, 61 Ill., 201; *Cumberland Co. v. Hoffman Co.*, 39 Barb., 16; *Robertson v. Smith*, 129 Ind., 422, 28 N. E., 857, 15 L. R. A. 273.

<sup>43</sup> *Kimm v. Steketee*, 44 Mich., 527, 7 N. W., 237.

<sup>44</sup> *Hanna v. McKenzie*, 5 B. Mon., 314.

avermment to maintain the action.<sup>45</sup> Nor is any demand for payment necessary before bringing suit upon the bond.<sup>46</sup>

§1654. **Disobedience to writ no defense to action.** The obligees in the bond may maintain an action thereon to recover damages sustained by them by reason of the injunction having been improperly granted, regardless of whether they have yielded obedience to the writ. The question whether they have disobeyed the writ is to be determined by the court which granted the injunction, upon proceedings for contempt, and such disobedience can not defeat the action upon the bond for the recovery of damages. Nor can it be said in such case that if they have disobeyed the injunction they have not performed their contract; since the bond is not a contract of their own making, or one into which they have voluntarily entered, and, therefore, the strict rules applicable to contracts mutually and voluntarily entered into can not be extended to such a case.<sup>47</sup>

§ 1655. **Imposition upon the court.** An injunction bond has been declared forfeited when it appeared that plaintiff had no equity whatever, and that he had imposed upon the court by invoking its aid, not for himself but for other persons in his name.<sup>48</sup>

§ 1656. **Doctrine of the United States courts.** The federal courts are not bound by the laws of the particular state in which they are held as to fixing the conditions of an injunction bond, or as regards the rights and obligations of the parties to such bond. They proceed rather in conformity with the practice of the English Court of Chancery, requiring or dispensing with a bond as the court in the exercise of a sound discretion may deem proper, and if a bond is required, prescribing its condition and penalty. And when an injunction bond is

<sup>45</sup> *Smith v. Gregg*, 9 Neb., 212,  
2 N. W., 459.

<sup>46</sup> *Rosendorf v. Mandel*, 18 Nev.,  
129, 1 Pac., 672.

<sup>47</sup> *Colcord v. Sylvester*, 66 Ill.,  
540. And see *Steel v. Gordon*, 14

Wash., 521, 45 Pac., 151.

<sup>48</sup> *Cook v. Chapman*, 3 Stew., 114.

given in a proceeding in a federal court, conditioned to pay such damages as may be recovered in case it shall be decided that the injunction was wrongfully obtained, the condition of the bond is not broken merely by a dissolution of the injunction, and there can be no recovery in the federal courts because of such dissolution alone; and there must first be a recovery or judgment determining the damages, before an action can be maintained against the obligors in the bond.<sup>43</sup>

<sup>43</sup> *Bein v. Heath*, 12 How., 168; *Deakin v. Lea*, 11 Biss., 34.

## IV. ASSESSMENT OF DAMAGES.

§ 1657. Practice divergent; equity powerless to award damages in original cause; no damages for final injunction.

1658. New York practice.

1659. Kentucky and Louisiana practice.

1660. The practice in Missouri.

1661. The Illinois practice.

1662. The same.

1662*a*. Damages may be assessed in bill to reform injunction bond.

§ 1657. **Practice divergent; equity powerless to award damages in original cause; no damages for final injunction.** The practice and modes of procedure to which resort is had for ascertaining and assessing damages upon injunction bonds, after a dissolution, vary largely in the different states, being generally regulated by express legislation, or by local rules of practice. In some of the states, as will be hereafter shown, an expeditious and summary method of procedure has been provided by legislation for determining the damages upon motion or suggestion in the injunction suit, and without the necessity of resorting to an original and independent action upon the bond. There has been much conflict of authority whether, in the absence of express legislation, a court of general equity powers might, upon dissolving an injunction, ascertain by reference, or otherwise, the amount of damages sustained by the injunction and decree payment of such amount without a new suit for that purpose. But, while courts of much respectability have insisted upon the exercise of such a jurisdiction, treating it as a cumulative remedy, entirely independent of and distinct from any action which might be brought upon the bond,<sup>1</sup> the undoubted weight both of authority and principle is against the exercise of such a juris-

<sup>1</sup> *Sturgis v. Knapp*, 33 Vt., 486; *patrick*, 71 Miss., 347, 14 So., 270. *Edwards v. Pope*, 3 Scam., 465; See *Roberts v. Dust*, 4 Ohio St., Canadian & A. M. & T. Co. v. Fitz- 502.

diction. It is certain that no warrant can be found for its exercise in the former practice of the English High Court of Chancery, and however desirable and convenient such procedure may be and undoubtedly is in practice, the doctrine is too firmly fixed to admit of controversy, that in the absence of positive legislation a court of equity has no power to afford a remedy upon the bond in the injunction suit, such a power being neither an incident to the general powers of courts of equity, nor consistent with the principles of equity jurisdiction. In the absence, therefore, of legislative authority to the contrary, a court of equity will not, upon dissolving an injunction, enforce payment of damages in the original cause, but will remit the parties aggrieved to their action upon the bond.<sup>2</sup> But while in the absence

<sup>2</sup> *Phelps v. Foster*, 18 Ill., 309; *Merryfield v. Jones*, 2 Curt. C. C., 206; *Garcie v. Sheldon*, 3 Barb., 232; *Lawton v. Green*, 64 N. Y. 326; *Bein v. Heath*, 12 How., 168; *Easton v. New York & L. B. R. Co.*, 11 C. E. Green, 359; *Taylor v. Brownfield*, 41 Iowa, 264; *Greer v. Stewart*, 48 Ark., 21, 2 S. W., 251; *Sartor v. Strassheim*, 8 Col., 185, 6 Pac., 215; *Offerman & W. R. Co. v. Waycross A. R. Co.*, 112 Ga., 610, 37 S. E., 871; *Spencer v. Sherwin*, 86 Iowa, 117, 53 N. W., 86. And see *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289; *Fountain v. West*, 68 Iowa, 380, 27 N. W., 264. For the practice in New Hampshire, see *Carpenter v. Fisher*, 68 N. H., 486, 38 Atl., 211, 73 Am. St. Rep., 616. In *Phelps v. Foster* 18 Ill., 309, Caton, J., in delivering the opinion of the court, says: "I have, with considerable reluctance, come to the conclusion that the court exceeded its power in awarding damages to the defendant and against the complainant. Except in the case of an injunction to restrain a judgment at law, I can find no warrant in the statute for awarding damages upon the dismissal of an injunction bill, and I can not find authority for sustaining it in the practice of the English Court of Chancery. The general principles of equity jurisdiction are against it. It is granting affirmative relief to the defendant, without a cross-bill, and when the pleadings do not justify it. I regret that it is so, for I think this power almost indispensable as a check upon the too free and dangerous use of this writ, which is liable to great abuse, unless the greatest circumspection is used by those invested with the high power of awarding it, which I regret to say, has not always been the case." In *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289, it was held where an interlocutory injunction was grant-

of legislative authority for such procedure it is error to assess damages against the sureties upon the bond in the original action to which they are not parties, such a decree will not be reversed for this reason when the sureties do not appeal from or question the decree, the appeal being that of the principal alone.<sup>3</sup> It is to be noted also that an assessment of damages is only allowed as an incident to or the result of the giving of a bond to secure such damages. And when no interlocutory injunction is granted or bond given, but the injunction is allowed as a part of the final decree in the cause, which is afterward reversed upon appeal, it is improper to assess damages for the granting of such injunction.<sup>4</sup> So also an independent suit for damages resulting from the granting of an injunction which is after-

ed without any bond or other security, the proceedings being instituted and the injunction obtained in good faith and without any vexatious or wanton motive, that plaintiffs could not be made liable for damages upon the final dissolution of the injunction, since they had never undertaken to pay any damages. The court, therefore, held it proper to dismiss a cross-bill filed by defendant seeking damages on account of the injunction, but declined to pass upon the question of jurisdiction to allow damages in the proceeding in equity, although inclining to the opinion that a court of equity was not a proper forum for determining that question. The *dictum* in *Russell v. Farley*, 105 U. S., 433, has resulted in the adoption of the contrary rule in the federal courts, and the doctrine is there well established that, upon the dissolution of an injunction, the defendant may at once proceed in

the injunction suit for the assessment of his damages, and will not be required to institute a separate action at law upon the bond. *Lea v. Deakin*, 11 Biss., 40; *Tyler Mining Co. v. Last Chance M. Co.*, 32 C. C. A., 498, 90 Fed., 15; *Leslie v. Brown*, 32 C. C. A., 556, 90 Fed., 171; *West v. East Coast Cedar Co.*, 51 C. C. A., 416, 113 Fed., 742; *Coosaw Mining Co. v. Farmers' Mining Co.*, 51 Fed., 107. But the sureties must be given their day in court. *Leslie v. Brown*, 32 C. C. A., 556, 90 Fed., 171. In North Carolina, under the provisions of § 341 of the code, it is held that the damages for the wrongful suing out of an injunction must be determined in the injunction suit and not in a separate action at law. *Crawford v. Pearson*, 116 N. C., 718, 21 S. E., 561.

<sup>3</sup> *Daniel v. Daniel*, 39 Ark., 266.

<sup>4</sup> *City of St. Louis v. St. Louis G. Co.*, 82 Mo., 349.



ward dissolved can not be maintained where no bond was filed at the time the injunction was granted.<sup>5</sup>

§ 1658. **New York practice.** Under the New York code of procedure the practice prevails of assessing damages upon the dissolution of an injunction by reference, or otherwise as the court may direct, in the original cause. And the party aggrieved by the improper granting of an injunction is entitled as a matter of right upon the dissolution to an order directing the manner in which his damages shall be ascertained.<sup>6</sup> So when the court denies a motion to continue an injunction and vacates the same, and an order is entered discontinuing the action, a reference to assess damages follows almost as a matter of course, even though the order of discontinuance is without costs to either party.<sup>7</sup> But when the bond is conditioned to pay such damages as defendant may sustain by reason of the injunction, "if the court shall finally decide that the plaintiff was not entitled thereto," to warrant a reference for the assessment of damages there must be a final decision in the injunction suit, and that decision must be, in effect, that plaintiff at the time of obtaining the injunction was not entitled thereto.<sup>8</sup> And it is held under the New York practice that when judgment is rendered for defendant in an injunction suit, from which plaintiff appeals, giving the necessary bond, defendant is not entitled pending such appeal to an order assessing his dam-

<sup>5</sup> *Scheck v. Kelly*, 95 Fed., 941.

<sup>6</sup> *Jacobs v. Miller*, 11 Hun, 441. A similar practice prevails in South Carolina. *Hill v. Thomas*, 19 S. C., 230. And the like practice obtains in Wisconsin. *Parish v. Reeve*, 63 Wis., 315, 23 N. W. 568.

<sup>7</sup> *Waterbury v. Bouker*, 10 Hun, 262. See also *Palmer v. Foley*, 2 Abb. New Cas., 191.

<sup>8</sup> *Benedict v. Benedict*, 15 Hun, 305. As to the English practice in determining damages upon a dissolution, where plaintiff had entered into an undertaking upon the granting of the injunction to abide by any order that the court might make as to damages arising from the injunction, see *Novello v. James*, 5 DeG., M. & G., 876.

ages by reason of the injunction, as there has been no final judgment that plaintiff was not entitled thereto.<sup>9</sup>

§ 1659. **Kentucky and Louisiana practice.** Under the Kentucky code the court is authorized upon the dissolution of an injunction against a judgment at law to ascertain and assess the damages and to render judgment thereon immediately and in the same proceeding;<sup>10</sup> and a somewhat similar practice prevails in Louisiana.<sup>11</sup> And the remedy thus provided is held to be an exclusive and not a cumulative remedy for the recovery of special damages upon the dissolution.<sup>12</sup> But this practice prevails in Kentucky only as to injunctions staying proceedings upon a judgment or final order of a court, and in all other cases the remedy for damages must be sought in an action upon the injunction bond.<sup>13</sup>

§ 1660. **The practice in Missouri.** The practice in Missouri requires the court, upon dissolving an injunction, to enter judgment against the obligors in the bond for the damages occasioned by the injunction; and when the bond is conditioned accordingly, for the payment of such damages as the court shall adjudge upon dissolution, there can be no recovery upon the bond until the court has so adjudged the damages.<sup>14</sup> But upon a motion for the assessment of damages against the obligors in an injunction bond, it is not necessary that the defendant should have asked for damages in his answer or that they

<sup>9</sup> *Musgrave v. Sherwood*, 76 N. Y., 194. See also *Benedict v. Benedict*, 76 N. Y., 600.

<sup>10</sup> *Crawford v. Woodworth*, 9 Bush, 745; *Logsdon v. Willis*, 14 Bush, 183.

<sup>11</sup> *Crescent City Co. v. Larrieux*, 30 La. An., 740.

<sup>12</sup> *Crawford v. Woodworth*, 9 Bush, 745.

<sup>13</sup> *Rankin v. Estes*, 13 Bush, 428; *Logsdon v. Willis*, 14 Bush, 183; *Alexander v. Gish*, 88 Ky., 13, 9 S. W., 801; *Eastern Ky. Ry. Co.*

*v. Brown*, 99 Ky., 540, 36 S. W., 555.

<sup>14</sup> *Dorriess v. Carter*, 67 Mo., 544.

See, as to the practice in Tennessee in entering judgment against the sureties upon the bond after a dissolution, but in the injunction suit, *Coltart v. Ham*, 2 Tenn. Ch., 356; *Henley v. Cliborne*, 3 Lea, 213. See, as to the practice in Texas, *Texas & N. O. R. Co. v. White*, 57 Tex., 129; *Allen v. Willis*, 60 Tex., 155. See also *Coates v. Caldwell*, 71 Tex., 19, where it is

should have been allowed by the court in the order dissolving the injunction and dismissing the bill.<sup>15</sup> And when an interlocutory injunction has been dissolved upon the final hearing, a motion for the assessment of damages should not be allowed at a subsequent term of court without notice to the adverse party.<sup>16</sup>

§ 1661. **The Illinois practice.** In Illinois it is provided by statute that upon the dissolution of an injunction the party claiming damages may at any time before final decree file in the original cause a suggestion in writing of the nature and amount of his damages, and the court shall hear evidence and assess the damages accordingly. And it is error to refuse leave to file such suggestion before entry of the final decree.<sup>17</sup> So it is error to assess such damages without any suggestion in writing of the nature and amount thereof.<sup>18</sup> Nor can a decree for damages in such case be sustained unless the evidence upon which the damages are assessed is preserved in the record.<sup>19</sup> Such assessment of damages is not regarded as a new proceeding, but as a continuation of the pending suit, and if either party desires a continuance it should be obtained by affidavit in the usual manner. And it being a continuation of the original chancery proceeding, the refusal to grant a jury trial upon such as-

held under the statutes of Texas, that upon dissolving an injunction damages may be assessed against both the principal and sureties, in the original action, without citation and without a new suit. And see as to the practice under the code of North Carolina in assessing damages upon an injunction bond, *McKesson v. Hennessee*, 66 N. C., 473.

<sup>15</sup> *Fears v. Riley*, 147 Mo., 453, 48 S. W., 828.

<sup>16</sup> *Hoffelmann v. Franke*, 96 Mo., 533, 10 S. W., 45.

<sup>17</sup> *Wing v. Dodge*, 80 Ill., 564.

<sup>18</sup> *Forth v. Town of Xenia*, 54 Ill., 210; *Hamilton v. Stewart*, 59 Ill., 330; *Albright v. Smith*, 68 Ill., 181; *Wilson v. Haecker*, 85 Ill., 349.

<sup>19</sup> *Forth v. Town of Xenia*, 54 Ill., 210; *Albright v. Smith*, 68 Ill., 181; *Hamilton v. Stewart*, 59 Ill., 330; *Wilson v. Haecker*, 85 Ill., 349; *Steele v. Boone*, 76 Ill., 457; *Palmer v. Gardiner*, 77 Ill., 143; *Spring v. Collector of Olney*, 78 Ill., 101.

assessment is not error when the granting of jury trials in chancery suits is made by law to rest in the discretion of the court.<sup>20</sup> And when upon dissolving an injunction the court grants leave to defendant to file a suggestion of damages, and the suggestion is filed at a subsequent term to which the cause is continued, the court retains jurisdiction for the purpose of fixing the damages.<sup>21</sup> But when plaintiff's right to an injunction is disposed of by a final decree of dissolution, from which he does not appeal, the decree upon the assessment of damages, although incidental to the dissolution, is an absolute money decree and an appeal will lie therefrom.<sup>22</sup>

§ 1662. **The same.** The Illinois practice, as above stated, has reference only to the assessment of damages against the plaintiff in the injunction suit, and does not authorize a decree for damages against the sureties, which can be obtained only by an action upon the bond. And under a bond conditioned to pay all such damages as shall be awarded against plaintiffs in the event of a dissolution, until there has been an actual assessment or award of damages the condition of the bond is not broken, and there can be no recovery upon the bond.<sup>23</sup> And the right of recovery in such case is limited to the amount of the costs growing out of and connected with the injunction.<sup>24</sup> So when under the statute in force at the time of giving the bond damages upon dissolution must be assessed in the injunction suit as a condition to a right of action upon the bond, a subsequent act of legislature authorizing a recovery upon the bond, notwithstanding a failure to assess damages upon the dissolution, can have no effect upon such bond already given; unless,

<sup>20</sup> *Holmes v. Stateler*, 57 Ill., 209.

<sup>23</sup> *Russell v. Rogers*, 56 Ill., 176;

<sup>21</sup> *Poyer v. Village of Des Plaines*, 123 Ill., 111, 13 N. E., 819.

*Brownfield v. Brownfield*, 58 Ill., 152; *McWilliams v. Morgan*, 70 Ill., 551.

<sup>22</sup> *Hedges v. Meyers*, 5 Bradw., 347.

<sup>24</sup> *McWilliams v. Morgan*, 70 Ill., 551.

therefore, damages have been assessed upon the dissolution, there can be no recovery upon the bond.<sup>25</sup> But the statute applies to cases where the injunction is only a part of or incidental to the principal relief sought, as well as where it is the sole object of the action.<sup>26</sup> And when an injunction is awarded, but no writ actually issues, defendant being present at the making of the order and agreeing to respect it without the formality of a writ, and the bill is afterward dismissed upon demurrer, the court may properly assess the damages, the order for the injunction in such case being regarded as equivalent to the writ.<sup>27</sup> Where, however, an interlocutory injunction is dissolved upon the coming in of the answer, but no decree is made finally dismissing the bill, it is error to assess damages, since there has been no final hearing, and the court may still, upon the final hearing, award a perpetual injunction.<sup>28</sup>

§ 1662 *a*. **Damages may be assessed in bill to reform injunction bond.** Where a bill in equity has been filed for the purpose of reforming an injunction bond from which the seal of the obligors has been inadvertantly omitted, it is proper for the court, in such proceeding, to assess the damages resulting from the granting of the injunction, since equity, having taken jurisdiction for one purpose, retains it for the purpose of affording complete relief.<sup>29</sup>

<sup>25</sup> *Alwood v. Mansfield*, 81 Ill., 314; *Deakin v. Lea*, 11 Biss., 34.

<sup>26</sup> *Darst v. Gale*, 83 Ill., 136.

<sup>27</sup> *Danville B. & T. Co. v. Parks*, 88 Ill., 170.

<sup>28</sup> *Terry v. Hamilton Primary School*, 72 Ill., 476.

<sup>29</sup> *Keith v. Henkleman*, 173 Ill., 137, 50 N. E., 692.

## V. DAMAGES.

- § 1663. Direct and immediate damages only allowed; illustrations.  
1664. Possible profits not allowed; misconduct of receiver in possession not allowed.  
1665. Vindictive damages; dissolution conclusive; expense of dissolution; pendency of appeal.  
1666. Injunction against judgment; interest.  
1667. Dissolution in part; recovery of judgment enjoined.  
1668. Injunctions against judgments and executions.  
1669. Damages limited by penalty; decree on dissolution conclusive; when obligation construed as several.  
1670. Dissolution implies damages; taxable costs.  
1671. Sale under trust deed; difference between currency and coin; purchase enjoined; bond in excess of statute.  
1672. Suit on note.  
1673. Cases affecting real property; rental; crops; emblements  
1674. Injunctions against sales of real estate.  
1675. Delay in completion of building.  
1676. Loss of time and employment.  
1677. Service of injunction unnecessary.  
1678. Injunction perpetuated in part; removal of grounds for injunction.  
1679. Percentage upon tax enjoined.  
1680. Fraudulent sale by judgment debtor.  
1681. Sale of patented article.  
1682. Nominal and real party.  
1683. Dispossession for non-payment of rent.  
1684. Discretion of court not reviewed on appeal.

§ 1663. **Direct and immediate damages only allowed; illustrations.** In estimating damages sustained by the improper issuing of an injunction, the courts proceed upon equitable grounds, and while it is difficult to fix any precise rule or standard for determining the damages upon dissolution, it may be said generally that nothing will be allowed which is not the actual, natural and proximate result of the wrong committed.<sup>1</sup> And where no damages have been actually in-

<sup>1</sup> Collins v. Sinclair, 51 Ill., 328; Sioux Falls W. Co., 10 S. Dak., Center v. Hoag, 52 Vt., 401; Brown 440, 73 N. W., 910.  
v. Jones, 5 Nev., 374; Edmison v.

curred, none should be assessed.<sup>2</sup> In other words, the liability upon the injunction bond is limited to such damages as arise from the suspension or invasion of vested legal rights by the injunction. Speculative and remote damages are not properly allowable, nor are those which are merely consequential, the limit being such damages as flow directly from the injunction as its immediate consequence.<sup>3</sup> Thus, remote and contingent benefits that might have accrued from the increased value of property resulting from the opening of a street which has been enjoined, will not be taken into account in an action upon the bond.<sup>4</sup> And the only damages which can be recovered are such as arise from the operation of the injunction itself, and not such as are occasioned by the suit independent of the injunction.<sup>5</sup> So damages for the loss of possible profits which might have accrued to defendant under a contract with a third person, which he was prevented by the injunction from carrying out, have been disallowed as too remote and conjectural and as not being the necessary and proximate result of the injunction.<sup>6</sup> But loss of profits of an established business resulting from the granting of an injunction are recoverable as damages in an action upon the bond, and evidence of profits which were actually being made is admissible to prove such damage.<sup>7</sup> So where a paying business is unavoidably suspended as the result of a temporary injunction and an actual loss of profits results thereby, such profits are recoverable in an action upon the bond. And in such case the profits for a reasonable period next preceding the injury may be taken as a *prima facie* measure of damages, leaving the

<sup>2</sup> Uhrig v. St. Louis, 47 Mo., 528.

<sup>4</sup> Steuart v. State, 20 Md., 97.

<sup>3</sup> Steuart v. State, 20 Md., 97;

<sup>5</sup> Burgen v. Sharer, 14 B. Mon.,

Morgan v. Negley, 53 Pa. St., 153;

497.

Hotchkiss v. Platt, 8 Hun, 46; Chi-

<sup>6</sup> Livingston v. Exum, 19 S. C., 223.

cago City R. Co. v. Howison, 86

Ill., 215; Livingston v. Exum, 19

<sup>7</sup> Lambert v. Haskell, 80 Cal., 611, 22 Pac., 327.

S. C., 223. And see Brown v.

Jones, 5 Nev., 374; Collins v. Sin-

clair, 51 Ill., 328.

defendant to show that because of depression in business or other causes the profits would have been less.<sup>8</sup> But defendants can not recover upon the bond unless they can show that they have sustained actual injury by the injunction; and when the injunction is dissolved upon their answer averring that they did not desire or intend to do the act enjoined, they can not recover upon the bond, having sustained no damages by reason of the injunction.<sup>9</sup> But where an injunction operates to delay the sale of property, real and personal, and pending such delay great depreciation occurs in the value of the property, such loss, being regarded as occasioned by the injunction, may be properly included in estimating the damages incurred.<sup>10</sup> So where the holder of a chattel mortgage has been enjoined from enforcing his mortgage, and, pending the injunction, the mortgaged property is sold by a junior mortgagee and the mortgagor has become insolvent, the amount of the prior mortgage debt is recoverable as damages in an action upon the bond brought after the dissolution of the injunction.<sup>11</sup> And since a defendant should be allowed a fair latitude of construction as to the meaning of an injunction in order that he may more surely avoid the risk of disobedience, damages resulting from a justifiable, although mistaken, construction of an injunction are recoverable, although they would not have resulted had defendant correctly understood the true import of the court's order.<sup>12</sup>

§ 1664. **Possible profits not allowed; misconduct of receiver in possession not allowed.** As illustrating the rule limiting the damages recoverable to those which are the direct and immediate result of the injunction, to the exclusion of merely conjectural and speculative damages, it is held, where an in-

<sup>8</sup> *Landis v. Wolf*, 206 Ill., 392, 69 N. E., 103.

<sup>9</sup> *Bank of Monroe v. Gifford*, 70 Iowa, 580, 31 N. W., 881.

<sup>10</sup> *Meysenburg v. Schlieper*, 48 Mo., 426, second edition, 399.

<sup>11</sup> *White v. Brooke*, 11 Wash., 99, 39 Pac., 237.

<sup>12</sup> *Webb v. Laird*, 62 Vt., 448, 20 Atl., 599, 22 Am. St. Rep., 121.



junction restrains the extension of a line of street railway, that, upon its dissolution, damages resulting from the possible profits which might have accrued, had the railway been extended, can not be allowed.<sup>13</sup> So where defendant is enjoined from interfering with or disposing of his property, and a receiver is at the same time appointed over his property, upon dissolution of the injunction defendant is entitled to such damages as are directly caused by the act of divesting him of his property and placing it in the hands of the receiver; but he is not entitled to damages arising from the receiver's negligence and misconduct while in possession, since such damages are not properly attributable to the injunction, and other security was taken therefor.<sup>14</sup>

§ 1665. **Vindictive damages; dissolution conclusive; expense of dissolution; pendency of appeal.** In the absence of malice in suing out the injunction, vindictive or punitive damages should not be allowed upon dissolution, but the recovery should be measured by simple compensation for the actual loss sustained.<sup>15</sup> But defendant who is injured by an injunction which is afterward dissolved is entitled, in his action upon the bond, to compensation for all loss and injury naturally and fairly referable to the wrongful act of the obligor in obtaining the injunction,<sup>16</sup> and the decree dissolving the injunction is, until reversed, conclusive that it was wrongfully obtained.<sup>17</sup> And in assessing the damages sustained a reasonable sum may be allowed for expense and trouble incurred in procuring a dissolution.<sup>18</sup> But it is improper to award damages for defendant's time and services in procuring the dissolu-

<sup>13</sup> *Chicago City R. Co. v. Howison*, 86 Ill., 215.

<sup>14</sup> *Hotchkiss v. Platt*, 8 Hun, 46.

<sup>15</sup> *Brown's Adm'r v. Tyler*, 34 Tex., 168; *Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex., 47, 11 S. W., 918. In the latter case, the court incline to the opinion that vindic-

tive damages are not recoverable even though malice is shown.

<sup>16</sup> *Smith v. Wells*, 46 Miss., 64.

<sup>17</sup> *Smith v. Wells*, 46 Miss., 64; *Cummings v. Mugge*, 94 Ill., 186.

<sup>18</sup> *Pargoud v. Morgan*, 2 La., 100.

tion, or for the mental strain and anxiety which he may have suffered by reason of the injunction.<sup>19</sup> And in a suit upon the bond, the recovery for costs and expenses incurred by reason of the injunction is limited to such as accrued between the time of issuing the writ and its dissolution,<sup>20</sup> and no damages are allowed during the pendency of an appeal to a higher court.<sup>21</sup>

§ 1666. **Injunction against judgment; interest.** Where a judgment at law has been enjoined, the judgment creditor is entitled upon dissolution to damages only upon so much of his judgment as remained due, and the collection of which was delayed by the injunction.<sup>22</sup> But in estimating damages after the dissolution of an injunction against a judgment, they should be computed upon the aggregate amount of principal, interest and costs due at the time the injunction took effect.<sup>23</sup> And interest upon the amount of the judgment during the time it was enjoined, or upon the whole sum, the collection of which was suspended by injunction, is allowable.<sup>24</sup> But after the dissolution of an injunction to a judgment at law, the judgment creditor will not, in an action upon the bond, be allowed interest on the amount of the judgment, if it has been fully satisfied.<sup>25</sup> Where, however, payment of money justly due has been enjoined, interest is recoverable as a matter of right up to the time of payment into court on dissolution of the injunction.<sup>26</sup> But in an action upon an injunction bond given in a penal sum, it is error to render judgment for interest upon the penalty in the bond.<sup>27</sup> And where one

<sup>19</sup> *Cook v. Chapman*, 41 N. J. Eq., 152, 2 Atl., 286. See also *Edwards v. Bodine*, 11 Paige, 223.

<sup>20</sup> *Wallis v. Dilley*, 7 Md., 237.

<sup>21</sup> *Woodson v. Johns*, 3 Munf., 230; *Jeter v. Langhorn*, 5 Grat., 193.

<sup>22</sup> *Southerland v. Crawford*, 2 J. J. Marsh., 370.

<sup>23</sup> *Washington's Ex'r v. Parks*, 6 Leigh, 581.

<sup>24</sup> *Gist v. McGuire*, 4 Har. & J., 9; *Aldrich v. Reynolds*, 1 Barb. Ch., 613.

<sup>25</sup> *Grundy v. Young*, 2 Cranch C. C., 114.

<sup>26</sup> *Wallis v. Dilley*, 7 Md., 237.

<sup>27</sup> *Rhea v. McCorkle*, 11 Heisk., 415.

has been frustrated and hindered in the collection of his debt by the wrongful suing out of an injunction against his execution, the surety in the bond is liable for damages thereby incurred, not exceeding the penalty named in the bond.<sup>28</sup> Where, as in some of the states, it is provided by statute that a certain percentage of judgments enjoined shall be assessed as damages on the dissolution, one not a party to the judgment, but who enjoins proceedings under it, is liable for the percentage as if he were a party.<sup>29</sup> It is held, however, that statutes allowing such a percentage of damages upon the dissolution of an injunction against a judgment at law are to be construed strictly as applicable to judgments alone, and not as including injunctions against decrees in chancery.<sup>30</sup> And a decree allowing a larger percentage upon the judgment as damages than that fixed by statute will be reversed for error.<sup>31</sup> So under a statute requiring a bond conditioned for the payment of all money and costs due or to become due to the plaintiff in the proceeding at law which is enjoined, and all costs and damages which shall be awarded upon a dissolution of the injunction, the statute authorizing the court upon dissolution to assess damages to an amount not exceeding ten per cent. of the sum improperly enjoined, it is error to include in the assessment of damages, made in the same cause upon dissolution, the entire amount of the judgment enjoined.<sup>32</sup> And when a bond given upon enjoining a judgment at law is conditioned to pay all sums of money, damages and costs which shall be awarded if the injunction is dissolved, it will not embrace the amount of the judgment and costs enjoined.<sup>33</sup> So upon the dissolution of an injunction against

<sup>28</sup> *Day v. Martin*, 7 La., 365.

<sup>29</sup> *Claytor v. Anthony*, 15 Grat., 518.

<sup>30</sup> *Head v. Perry*, 1 Monr., 253;  
*Martin v. Wade's Ex'rs*, 5 Monr., 77.

<sup>31</sup> *Camp v. Bryan*, 84 Ill., 250.

<sup>32</sup> *Roberts v. Fahs*, 36 Ill., 268;

*Joslyn v. Dickerson*, 71 Ill., 25.  
See as to damages upon an injunction bond under the Illinois statute of 1861, *Rees v. Peltzer*, 1 Bradwell, 315.

<sup>33</sup> *Browning v. Porter*, 2 Mc-

a void judgment damages will not be allowed, since, the judgment being void, no damages can be sustained by a stay of proceedings thereunder.<sup>34</sup>

§ 1667. **Dissolution in part; recovery of judgment enjoined.** When an injunction against a judgment at law is dissolved in part and perpetuated as to the residue, it is proper to award damages pertaining to the amount of the judgment as to which the injunction was dissolved.<sup>35</sup> But where a judgment is enjoined upon a bond conditioned for payment of the judgment with costs and damages in the event of a dissolution, to warrant a recovery of the judgment in an action upon the injunction bond after dissolution, it should be averred that it has not been paid.<sup>36</sup>

§ 1668. **Injunctions against judgments and executions.** Where a judgment creditor is enjoined from proceeding against certain specific property claimed by a third person, a stranger to the original suit, without interfering with the remedy against other property or against the person of the debtor, who is not made a party to the bill, the court will not, on dissolving the injunction and dismissing the bill, decree the amount of the judgment as a penalty against complainants.<sup>37</sup> So if the injunction is dissolved only as to a portion of the property affected by the writ, which portion has not depreciated in value, and is

Crary, 581; *Grove v. Bush*, 86 Iowa, 94, 53 N. W., 88; *Fernandez v. Casey*, 77 Tex., 452, 14 S. W., 149.

<sup>34</sup> *Wingfield v. McLure*, 48 Ark., 510, 3 S. W., 439. In Louisiana it is held that damages will not be allowed upon the dissolution of an injunction except in cases where the execution of a money judgment is enjoined. *Green v. Reagan*, 32 La. An., 974; *King v. La Branche*, 35 La. An., 305. See also *Carroll v. Readheimer*, 35 La. An., 374.

<sup>35</sup> *Perry v. Kearney*, 14 La. An., 401.

<sup>36</sup> *Crawford v. Woodworth*, 9 Bush, 745. It is held in Virginia that damages on the dissolution of an injunction against a judgment at law form, as to the party obtaining the injunction, a part of the judgment, and are embraced in its lien. *Michaux's Adm'r v. Brown*, 10 Grat., 612.

<sup>37</sup> *Portsmouth Turnpike Co. v. Byington*, 12 Ohio, 114.

afterward sold on execution and the proceeds of the sale are applied on the judgments, complainants should not be decreed to pay both the amount of the judgments and the penalty.<sup>38</sup> And where complainant enjoins the sale of his own property under executions against a third person, leaving the executions otherwise in full force as to the debtor's property, the measure of damages in an action upon the bond is the real loss actually incurred, with costs, and not the amount due on the executions.<sup>39</sup> So upon the dissolution of an injunction restraining the sale of personal property under execution, some of which is liable to execution, the measure of damages is the value of that portion of the property which was subject to execution.<sup>40</sup>

§ 1669. **Damages limited by penalty; decree on dissolution conclusive; when obligation construed as several.** Where the practice prevails of decreeing damages upon the dissolution, it is held that the court can not go beyond the bond and award greater damages than the penalty therein fixed.<sup>41</sup> And when a court of equity has awarded damages upon dissolving an injunction, its decree is held to be conclusive as to the amount which can be recovered in an action upon the bond. In such action the surety is bound by the decree and will not be permitted to

<sup>38</sup> *Teaff v. Hewitt*, 1 Ohio St., 511.

<sup>39</sup> *Hord v. Trimble*, 1 Lit., 413.

<sup>40</sup> *Coates v. Caldwell*, 71 Tex., 19, 8 S. W., 922.

<sup>41</sup> *Sturgis v. Knapp*, 33 Vt., 486; *Lawton v. Green*, 64 N. Y., 326, modifying S. C., 5 Hun, 157; *Nansemond Timber Co. v. Rountree*, 122 N. C., 45, 29 S. E., 61. And see, *ante*, § 1630. Under Section 12, of Chapter 69, of the Revised Statutes of Illinois, it is held that the court which has granted an injunction may assess such damages as the defendant has sus-

tained by reason of the wrongful suing out of the writ, regardless of whether or not a bond has been filed; and that, if one has been filed, the court, in so awarding damages, is not limited by the penalty named in the bond, since the object of the bond is not to fix the limit of complainant's liability for a wrongful suing out of the injunction, but is to secure the payment of such damages as the defendant may sustain, regardless of their amount. *Kohlsaat v. Crate*, 144 Ill., 14, 32 N. E., 481.

show in defense that less damages were sustained than the amount awarded by the decree, since this would re-open the whole subject-matter of the decree.<sup>42</sup> And if the damages to the different parties against whom the injunction issued are several and distinct in their nature, the bond will be held to be a several obligation, although its language might be construed to cover merely an obligation to the defendants jointly.<sup>43</sup>

§ 1670. **Dissolution implies damages; taxable costs.** The payment of damages is considered as a penalty for failure to sustain an injunction, and it is held that the order of dissolution necessarily imports that the damages are to be paid, unless it expressly remits them.<sup>44</sup> And where the bond is conditioned for the payment of such damages as the court may award, and the court simply dissolves the injunction and dismisses the bill without decreeing any damages, the order of dissolution necessarily implies that the damages must be paid.<sup>45</sup> So a bond conditioned for the payment of such costs and damages as may be awarded against complainant in case the injunction is dissolved authorizes a recovery of the damages and costs incurred, whether awarded upon the dissolution, or afterward, or in a different proceeding.<sup>46</sup> And in computing damages upon the dissolution of an injunction, the taxable costs of so much of the proceedings in the injunction suit as were necessary to procure the dissolution may properly be included.<sup>47</sup> But costs which would have been incurred even

<sup>42</sup> *Lothrop v. Southworth*, 5 Mich., 436.

<sup>43</sup> *Sturgis v. Knapp*, 33 Vt., 486.

<sup>44</sup> *Claytor v. Anthony*, 15 Grat., 518.

<sup>45</sup> *Claytor v. Anthony*, 15 Grat., 518. But see *Ashby v. Chambers*, 3 Dana, 437, where it is held that there can be no recovery upon an injunction bond conditioned for the payment of such damages as

shall be awarded, where none have been decreed upon the dissolution of the injunction.

<sup>46</sup> *Hibbard v. McKindley*, 28 Ill., 240; *Brown v. Gorton*, 31 Ill., 416; *Edwards v. Edwards*, Ib., 474; *Roberts v. Dust*, 4 Ohio St., 502.

<sup>47</sup> *Aldrich v. Reynolds*, 1 Barb. Ch., 613. See also upon the question of costs, *Lillie v. Lillie*, 55 Vt., 470.

though no injunction had been granted and which were therefore not caused by the injunction are not recoverable as damages.<sup>48</sup>

§ 1671. **Sale under trust deed; difference between currency and coin; purchase enjoined; bond in excess of statute.** An injunction against the sale of property under a deed of trust or mortgage is not necessarily a proceeding restraining the collection of money, and damages in such case are not to be estimated under a statute prescribing a fixed rate of damages on the dissolution of injunctions restraining the payment of money, but they should be computed according to the degree of injury actually sustained.<sup>49</sup> In all such cases the amount of injury should be determined by proper evidence, taking into consideration the probable amount that might have been realized had the sale not been enjoined, the value of money at the time, and such other circumstances as tend to show the actual damages sustained.<sup>50</sup> And the depreciation in value of the mortgaged property pending the injunction is a proper element of damages in an action upon the bond.<sup>51</sup> But it is improper to allow the difference in the value of United States treasury notes at the time of granting and of dissolving the injunction, as compared with the market value of gold coin.<sup>52</sup> The court may, however, upon dissolving an injunction against a sale of real estate under a foreclosure decree, allow in as-

<sup>48</sup> *Edmison v. Sioux Falls W. Co.*, 14 S. Dak., 486, 85 N. W., 1016.

<sup>49</sup> *Kennedy's Admr'x v. Hammond*, 16 Mo., 341; *Alliance Trust Co. v. Stewart*, 115 Mo., 236, 21 S. W., 793. In *Wabash Ry. Co. v. McCabe*, 118 Mo., 640, 24 S. W. 217, it is held that such a statute should be construed as prescribing a fixed rate of damages upon the amount released but not as restricting the damages to that amount and that it does not pre-

vent the recovery of any other damages, such as counsel fees, which the defendant may have sustained by reason of the improvident suing out of the injunction against the execution of the judgment.

<sup>50</sup> *St. Louis v. Alexander*, 23 Mo., 483. And see *Marsh v. Morton*, 75 Ill., 621.

<sup>51</sup> *Bolling v. Tate*, 65 Ala., 417.

<sup>52</sup> *Riddlesbarger v. McDaniel*, 38 Mo., 138.

sessing the damages a reasonable attorney's fee for defending the injunction suit, and may also allow the costs of advertising the sale.<sup>53</sup> And upon the dissolution of an injunction against a sale of land under a trust deed in the nature of a mortgage, the trustee having merely the naked legal title for the purposes of the trust can not release the damages occasioned by the injunction, and the beneficiary or *cestui que trust* may recover damages upon the bond, notwithstanding an attempted release of such damages by the trustee.<sup>54</sup> If a purchaser of land under a deed of trust is enjoined from taking possession, to which he is entitled, upon dissolution of the injunction the rule of damages will be the rental value of the premises while the injunction was in force.<sup>55</sup> But where a sale under a deed of trust is enjoined, the statute requiring a bond conditioned for the payment of damages and costs only, but the bond is given conditioned for the payment of the mortgage indebtedness, there can be no recovery of such indebtedness upon the bond, and the recovery will be limited to what would have been allowed had the condition complied with the statute.<sup>56</sup>

§ 1672. **Suit on note.** Upon the dissolution of an injunction to an action at law on a promissory note, the bond being conditioned for the payment of all damages which may result to the party enjoined by reason of the injunction, plaintiffs should be allowed their taxable costs during the time they were delayed by the injunction, both in the action at law and in the suit in equity, provided such costs can not be realized from the parties prosecuting the injunction suit.<sup>57</sup> But the court can not assess as damages, upon the dissolution of such an injunction, the amount of the notes, the suit upon which was enjoined, upon the ground that the maker, while solvent

<sup>53</sup> *Cummings v. Burleson*, 78 Ill., 281.

<sup>56</sup> *Menken v. Frank*, 57 Miss., 732.

<sup>54</sup> *O'Reilly v. Miller*, 52 Mo., 210.

<sup>57</sup> *Derry Bank v. Heath*, 46 N.

<sup>55</sup> *Hosmer v. Campbell*, 98 Ill., 572.

H., 524.



at the time the injunction was granted, had become insolvent when the injunction was dissolved.<sup>58</sup>

§ 1673. **Cases affecting real property; rental; crops; emblements.** In determining the amount of damages to be allowed upon the dissolution of an injunction restraining one from exercising acts of ownership over his real property, the courts are not governed by arbitrary rules, but proceed upon equitable principles, the defendant being entitled to such damages as are the necessary and proximate result of such deprivation.<sup>59</sup> And the loss of timber, wood and sand which have been taken away from the premises pending the injunction, and while the owner was deprived of the right to protect his land from invasion, may be included in the assessment of damages.<sup>60</sup> So the loss of the use and rental of the premises during the time defendant was enjoined is a proper element of damages to be recovered in an action upon the bond.<sup>61</sup> So, too, damages for the crops which defendant was prevented by the injunction from harvesting may properly be allowed,<sup>62</sup> as well as waste committed upon the premises while defendants were deprived of their possession by the injunction.<sup>63</sup> And in such cases the rule of damages is not limited to what the land was worth to plaintiff in the injunction suit, but the damages actually sustained by defendants by being kept out of possession will be allowed; and evidence showing that defendants lost their crops for the entire season, by reason of being deprived of the land, is admissible.<sup>64</sup> And where a mortgagor obtains an injunction to prevent the mortgagee from selling

<sup>58</sup> Walker v. Pritchard, 135 Ill., 103, 25 N. E., 573, 11 L. R. A., 577. Richardson v. Allen, 74 Ga., 719. But see Hill v. Hill, 59 Vt., 125, 7

<sup>59</sup> Alexander v. Colcord, 85 Ill., 323; Banks v. State, 62 Md., 88. Atl., 468.

<sup>62</sup> Allen v. Brown, 5 Lans., 511.

<sup>60</sup> Alexander v. Colcord, 85 Ill., 323.

<sup>63</sup> Richardson v. Allen, 74 Ga., 719.

<sup>61</sup> Smith v. Wells, 46 Miss., 64; Hosmer v. Campbell, 98 Ill., 572;

<sup>64</sup> Edwards v. Edwards, 31 Ill., 474.

the premises under a decree in foreclosure, and pending the injunction the mortgagor removes emblements from the premises, the value of the emblements should be included in the damages awarded to the mortgagee upon dissolution.<sup>65</sup> So when the sale of lands is delayed by injunction, interest on the purchase price received at the sale after dissolution of the injunction may be allowed as damages, such loss being the direct result of the injunction.<sup>66</sup> And a judgment in an action of trespass between the parties, establishing the right of defendant in the injunction suit to the land, is conclusive evidence in an action by such defendant upon the injunction bond that he was entitled to the land and was injured by the injunction.<sup>67</sup>

§ 1674. **Injunctions against sales of real estate.** Where plaintiff, being in possession of and claiming title to real estate, enjoins its sale under execution against his vendor, upon the dissolution of the injunction defendant is not entitled to judgment against plaintiff, upon the injunction bond, for the amount of the debt enjoined, it not being the plaintiff's debt or one for which he is in any way liable.<sup>68</sup> And where one claiming title to real estate enjoins its sale under execution against another upon a judgment to which plaintiff in the injunction suit was not a party, it is error upon dissolving the injunction to award as damages the amount of such judgment. And this is true, even under a statute authorizing damages to be assessed upon the amount of money enjoined, when the injunction restrains the collection of money; since the injunction in the case stated is not to restrain the collection of money, but a sale of land, under an execution to which plaintiff was not a party.<sup>69</sup> So

<sup>65</sup> *Aldrich v. Reynolds*, 1 Barb. Ch., 613. As to the proper damages where defendant has by the injunction been prevented from clearing certain land, and from carrying out a contract to furnish a given amount of lumber, see *McKinzie v. Mathews*, 59 Mo., 99.

<sup>66</sup> *Hill v. Thomas*, 19 S. C., 230.

<sup>67</sup> *Banks v. State*, 62 Md., 88.

<sup>68</sup> *Moore v. Hallum*, 1 Lea, 511.

<sup>69</sup> *Carlin v. Hudson*, 12 Tex., 202; *Griffin v. Chadwick*, 44 Tex., 409, disaffirming *Gault v. Goldthwaite*, 34 Tex., 104.

where a vendor of land is enjoined from completing his sale, the injury which he suffers being the deprivation of his money, the law will not regard collateral or consequential damages arising from delay in receiving the money, but will only allow interest upon the money itself.<sup>70</sup>

§ 1675. **Delay in completion of building.** While it is the duty of defendants against whom a temporary injunction is granted to do all that a prudent man would do to reduce plaintiff's damages in the event of a dissolution, yet if they have acted in good faith they will not be held rigidly to the adoption of such a course as would certainly have saved plaintiff from loss. And where defendants are enjoined from tearing down a wall for the erection of a new building, and are thereby delayed in the completion of their building, it is proper to include in the damages loss in rent of the building, increased cost of labor and materials, and counsel fees upon the motion to dissolve and upon an appeal from the order of dissolution.<sup>71</sup>

§ 1676. **Loss of time and employment.** When it is sought in an action upon an injunction bond to recover damages for loss of time and employment, in the absence of any evidence showing that plaintiffs used diligence in attempting to find other employment during the period in which they were enjoined, damages will not be allowed for such loss.<sup>72</sup>

§ 1677. **Service of injunction unnecessary.** An injunction bond being for the benefit of all the defendants enjoined, regardless of whether they are served with process, to entitle one to damages upon a dissolution it is sufficient that he has rendered himself obedient to the injunction, although the writ may not have been served upon him, and he is then entitled to a reference to ascertain his damages.<sup>73</sup>

<sup>70</sup> *Graham v. Campbell*, 7 Ch. D., 490. As to damages in case of an injunction against the cutting of timber, see *Lillie v. Lillie*, 55 Vt., 470.

<sup>72</sup> *Muller v. Fern*, 35 Iowa, 420; *Nansemond Timber Co. v. Roundtree*, 122 N. C., 45, 29 S. E., 61.

<sup>73</sup> *Cumberland Co. v. Hoffman Co.*, 39 Barb., 16.

<sup>71</sup> *Roberts v. White*, 73 N. Y., 375.

§ 1678. **Injunction perpetuated in part; removal of grounds for injunction.** When an injunction is perpetuated in part plaintiff should not be required to pay the costs, since he is the prevailing party so far as the injunction is allowed to stand, and it is error to decree costs against him.<sup>74</sup> And in general, wherever an injunction is rightfully obtained upon sufficient grounds, and is afterward dissolved upon the removal of those grounds, complainant should not be required to pay damages upon the dissolution, having had good cause for the injunction in the first instance.<sup>75</sup> Thus, where judgments for the purchase money of real estate are enjoined on the ground of defective title, and a dissolution is granted upon the title being made good, no damages should be allowed against complainant.<sup>76</sup>

§ 1679. **Percentage upon tax enjoined.** Under a statute authorizing the court upon dissolving an injunction against the collection of money, if satisfied that it was obtained for delay, to assess damages at a given percentage upon the amount enjoined, an injunction against the collection of a tax is regarded as falling within the statute, and the court may award damages accordingly upon dissolving such injunction.<sup>77</sup>

§ 1680. **Fraudulent sale by judgment debtor.** Where a judgment debtor makes a fraudulent sale of his goods, without consideration, and still retaining possession, and the vendee under such fraudulent sale obtains an injunction against a sale of the goods under execution against the debtor, upon dissolving such injunction it is the duty of the court to award the highest damages allowed by law for such an abuse of the equitable remedy of the court.<sup>78</sup>

<sup>74</sup> *Ross v. Gordon*, 2 Munf., 289; *Hoofman v. Marshall*, 1 J. J. Marsh., 64.

<sup>75</sup> *McKoy v. Chiles*, 5 Monr., 259; *Payne v. Wallace*, 6 Monr., 381; *Porter v. Scobie*, 5 B. Mon., 387; *Lampton v. Usher's Heirs*, 7 B. Mon., 57; *Fishback v. Williams*, 3 Bibb, 342.

<sup>76</sup> *Porter v. Scobie*, 5 B. Mon., 387; *Lampton v. Usher's Heirs*, 7 B. Mon., 57; *Fishback v. Williams*, 3 Bibb, 342.

<sup>77</sup> *Rio Grande R. Co. v. Scanlan*, 44 Tex., 649.

<sup>78</sup> *Pendleton v. Eaton*, 23 La. An., 435.

§ 1681. **Sale of patented article.** When defendants are restrained from selling an alleged patented article, upon the ground that plaintiffs have the sole control of its sale as grantees of the patentees, but plaintiffs fail to maintain their injunction because of their failure to prove that the article was patented, plaintiffs and their sureties will be held liable in an action upon the bond for the damages thereby sustained.<sup>79</sup>

§ 1682. **Nominal and real party.** When proceedings at law conducted for the benefit of one person, but in the name of another, are restrained by an injunction which is not directed to the real party in interest, but only to the nominal party, the damages and expenses incurred by the real party in interest in procuring a dissolution of the injunction will be presumed in law to have been incurred by the defendant of record, the nominal party, and may be recovered in his name for the benefit of the real party in interest.<sup>80</sup>

§ 1683. **Dispossession for non-payment of rent.** Where an injunction is obtained to prevent the dispossession of plaintiff for non-payment of rent, upon the dissolution of the injunction the amount of rent at the rate reserved in the lease, while plaintiff kept possession, is a fair measure of damages.<sup>81</sup>

§ 1684. **Discretion of court not reviewed on appeal.** Under a statute conferring upon the court discretionary power to award damages upon dissolving an injunction, not exceeding a certain amount, a court of appellate jurisdiction will not ordinarily review the exercise of that discretion, even though the amount assessed is much less than the limit fixed by the statute.<sup>82</sup>

<sup>79</sup> *Wentzel v. Robinson*, 23 La. An., 451. allowing damages upon a total or partial dissolution, *Russell v. Farley*, 105 U. S., 433. As to the extent to which damages will be allowed against minors upon the dissolution of an injunction obtained by them, see *Greig v. Eastin*, 30 La. An., 1130.

<sup>80</sup> *Andrews v. Glenville Woolen Co.*, 50 N. Y., 282.

<sup>81</sup> *Bray v. Poillon*, 4 Thomp. & C., 663.

<sup>82</sup> *Moore v. Granger*, 30 Ark., 574. See further as to the discretion of the inferior court in dis-

## VI. COUNSEL FEES.

- § 1685. General rule as to allowance of counsel fees.  
 1686. Test as to allowance.  
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 1692. Not allowed when injunction expires by its terms; contingent fee not allowed.  
 1692a. Bond given in federal court; counsel fees recoverable in state court, although not allowed in federal court.

§ 1685. **General rule as to allowance of counsel fees.** A reasonable amount of compensation paid as counsel fees in procuring the dissolution of an injunction may be recovered in an action upon the bond, or in the assessment of damages in the injunction suit after dissolution where that practice prevails, if the injunction was improperly or wrongfully sued out, the amount being limited to fees paid counsel for procuring the dissolution, and not for defending the entire case. Counsel fees in such cases are regarded as a proper subject of consideration in estimating the damages incurred, the loss being as direct and immediate as any other.<sup>1</sup> And under a statute re-

<sup>1</sup> Behrens v. McKenzie, 23 Iowa, 372; Collins v. Sinclair, 51 Ill., 333; Edwards v. Bodine, 11 Paige, 328; Joslyn v. Dickerson, 71 Ill., 25; 224; Coates v. Coates, 1 Duer, 664; Cummings v. Burleson, 78 Ill., Corcoran v. Judson, 24 N. Y., 106; 281; Kohlsaat v. Crate, 144 Ill., Aldrich v. Reynolds, 1 Barb. Ch., 14, 32 N. E., 481; Keith v. Henkleman, 173 Ill., 137, 50 N. E., 692; 613; Rose v. Post, 56 N. Y., 603; McRae v. Brown, 12 La. An., 181; Bayliss v. Scudder, 6 Hun, 300; Ah Aiken v. Leathers, 37 La. An., 482; Thaie v. Quan Wan, 3 Cal., 216; Wittich v. O'Neal, 22 Fla., 592; Prader v. Grim, 13 Cal., 585; Garrett v. Logan, 19 Ala., 344; Bush Parker v. Bond, 5 Mont., 1; Montgomery v. Gilbert, 24 Mont., 121, v. Kirkbride, 131 Ala., 405, 30 So., 60 Pac., 1038; Cook v. Chapman, 780; Derry Bank v. Heath, 45 N. H., 524; Ryan v. Anderson, 25 Ill., 41 N. J. Eq., 152; Richardson v.

quiring the court, after dissolving an injunction, upon a suggestion of damages being filed by the injured party, to assess the damages sustained by reason of the injunction, it is not error to include counsel fees for defending the injunction suit.<sup>2</sup> And the acceptance of a statutory attorney's fee will not be regarded as a waiver of the right to recover counsel fees in an action upon an injunction bond.<sup>3</sup>

§ 1686. **Test as to allowance.** The allowance of counsel fees as damages upon dissolving an injunction is based upon

Allen, 74 Ga., 719; Livingston v. Exum, 19 S. C., 223; Brown v. Jones, 5 Nev., 374; Raupman v. City of Evansville, 44 Ind., 392; Anderson v. Provident L. & T. Co., 26 Wash., 192, 66 Pac., 415; Wisconsin M. & F. I. Co. v. Durner, 114 Wis., 369, 90 N. W., 435; Buford v. Keokuk N. L. P. Co., 3 Mo. App., 159; Hannibal & St. J. R. Co. v. Shepley, 1 Mo. App., 254; Bohan v. Casey, 5 Mo. App. 101. See also Park v. Musgrave, 6 Hun, 223; Miles v. Edwards, 6 Mont., 180; Beeson v. Beeson, 59 Ind., 97. And it has been held that not only are counsel fees incurred in procuring the dissolution of an injunction recoverable, but also those incurred in the reference for the ascertainment of counsel fees incurred on the dissolution. Wisconsin M. & F. I. Co. v. Durner, 114 Wis., 369, 90 N. W., 435. But, notwithstanding the well settled doctrine allowing reasonable counsel fees, it is held by the Supreme Court of the United States, that in an action upon the bond to recover damages after a dissolution, counsel fees incurred by defendant in the injunction suit can not be allowed, although the bond be con-

ditioned for the payment of all damages and costs which may be occasioned by the injunction. The reasoning upon which this conclusion is based is that there is no fixed standard for determining what should be allowed as counsel fees, and that their allowance is forbidden by the analogies of the law, and by sound public policy. Oelrichs v. Spain, 15 Wal., 211. And a similar doctrine prevails in Arkansas, Pennsylvania, Tennessee, Texas and Virginia, where counsel fees are not allowed. Oliphint v. Mansfield, 36 Ark., 191; Sesenig v. Parry, 113 Pa. St., 115, 5 Atl., 11; Stringfield v. Hirsch, 94 Tenn., 425, 29 S. W., 609, 45 Am. St. Rep., 733; Galveston, H. & S. A. R. Co. v. Ware, 74 Tex., 47, 11 S. W., 918; Davis v. Rosedale S. R. Co., 75 Tex., 381, 12 S. W., 999; Jones v. Rosedale S. R. Co., 75 Tex., 382, 12 S. W., 998; Wisecarver v. Wisecarver, 97 Va., 452, 34 S. E., 56. See also New National T. Co. v. Dulaney, 86 Ky., 16, 6 S. W., 590; Bennett v. Lambert, 100 Ky., 737, 39 S. W., 419.

<sup>2</sup> Misner v. Bullard, 43 Ill., 470.

<sup>3</sup> Steel v. Gordon, 14 Wash., 521, 45 Pac., 151.

the fact that defendant has been compelled to employ aid in ridding himself of an unjust restriction, which has been placed upon him by the action of plaintiff.<sup>4</sup> And the true test with regard to the allowance of counsel fees as damages would seem to be, that if they are necessarily incurred in procuring the dissolution of the injunction, when that is the sole relief sought by the action, they may be recovered; but if the injunction is only ancillary to the principal object of the action and the liability for counsel fees is incurred in defending the action generally, the dissolution of the injunction being only incidental to that result, then such fees can not be recovered.<sup>5</sup> Thus, where the principal purpose of the action was to adjudicate a question of title, and an interlocutory injunction was obtained, but no motion was ever made or argued for its dissolution, and the case was finally tried upon its merits upon the question of title and decided in favor of defendants, and the injunction was thereupon dissolved by virtue of the judgment upon the main controversy, it was held that counsel fees for the dissolution could not be recovered in an action upon the bond.<sup>6</sup> So where the principal contest upon the hearing was not with ref-

<sup>4</sup> *Buford v. Keokuk N. L. P. Co.*, 3 Mo. App., 159; *Bolling v. Tate*, 65 Ala., 417; *Anderson v. Provident L. & T. Co.*, 26 Wash., 192, 66 Pac., 415.

<sup>5</sup> *Noble v. Arnold*, 23 Ohio St., 264; *Riddle v. Cheadle*, 25 Ohio St., 278; *Langworthy v. McKelvey*, 25 Iowa, 48; *Carroll County v. Iowa R. L. Co.*, 53 Iowa, 685, 6 N. W., 69; *Bullard v. Harkness*, 83 Iowa, 373, 49 N. W., 855; *Ady v. Freeman*, 90 Iowa, 402, 57 N. W., 879; *Leonard v. Central Insurance Co.*, 101 Iowa, 482, 70 N. W., 629; *Blair v. Reading*, 99 Ill., 600; *Walker v. Pritchard*, 135 Ill., 103, 25 N. E., 573, 11 L. R. A., 577; *Keith v. Henkleman*, 173 Ill., 137, 50 N. E.,

692; *Landis v. Wolf*, 206 Ill., 392, 69 N. E., 103; *Newton v. Russell*, 87 N. Y., 527; *Randall v. Carpenter*, 88 N. Y., 293; *Brown v. Baldwin*, 121 Mo., 126, 25 S. W., 863; *Garlington v. Copeland*, 43 S. C., 389, 21 S. E., 317; *Trester v. Pike*, 60 Neb., 510, 83 N. W., 676; *Cunningham v. Finch*, 63 Neb., 189, 88 N. W., 168; *Donahue v. Johnson*, 9 Wash., 187, 37 Pac., 322; *Tabor v. Clark*, 15 Col., 434, 25 Pac., 181. See also *Reece v. Northway*, 58 Iowa, 187, 12 N. W., 258; *Thurston v. Haskell*, 81 Me., 303, 17 Atl., 73; *Barrett v. Bowers*, 87 Me., 185, 32 Atl., 871.

<sup>6</sup> *Allport v. Kelley*, 2 Mont., 343.



erence to the injunction, but concerning a question of title, the injunction being only incidental thereto, and the counsel fees incurred upon the trial would have been incurred in the absence of any injunction, it was held that they could not be included in the damages.<sup>7</sup> So where the granting of an injunction is simply incidental to the principal relief sought by the bill, and there was no controversy as to the propriety of the injunction, and it appeared that the same services would have been required had no injunction been granted, counsel fees are not recoverable.<sup>8</sup> Nor will such fees be allowed when no motion to dissolve was made and when the fees proven were for the preparation and management of the case upon the final hearing, and when it is not shown that any portion of such expense was caused by reason of the temporary injunction.<sup>9</sup> Nor will such fees be allowed when it is not shown that the injunction rendered the trial of the cause more difficult than it would otherwise have been, or that it increased the expense of defending the action.<sup>10</sup> So counsel fees for preparing affidavits to be used upon a motion to dissolve are properly disallowed, when it is not shown that such affidavits were actually used, and when the injunction was dissolved because of the insufficiency of the petition upon which it was granted.<sup>11</sup> And where the evidence fails to discriminate between the services rendered in the cause generally and those necessarily incurred in procuring the dissolution of a temporary injunction, there is no basis upon which an allowance of counsel fees may be made.<sup>12</sup> And counsel fees for services rendered in opposition to a motion to show cause why a preliminary injunction should not issue are not recover-

<sup>7</sup> *Disbrow v. Garcia*, 52 N. Y., 654.

<sup>8</sup> *Moriarity v. Galt*, 125 Ill., 417, 17 N. E., 714.

<sup>9</sup> *Hovey v. Rubber Tip Pencil Co.*, 50 N. Y., 335; *Hotchkiss v. Platt*, 8 Hun, 46.

<sup>10</sup> *Allen v. Brown*, 5 Lans., 511.

<sup>11</sup> *Ellwood M. Co. v. Rankin*, 70 Iowa, 403, 30 N. W., 677.

<sup>12</sup> *Lambert v. Alcorn*, 144 Ill., 313, 33 N. E., 53, 21 L. R. A., 611; *Landis v. Wolf*, 206 Ill., 392, 69 N. E., 103; *Mitchell v. Hawley*, 79 Cal., 301, 21 Pac., 833.

able, since such services are by virtue of the order to show cause and not by virtue of the injunction.<sup>13</sup> So counsel fees incurred in procuring the dissolution of a mere restraining order granted pending the hearing of a motion for a temporary injunction are not ordinarily recoverable.<sup>14</sup> But where, after the granting of such a restraining order, the hearing of the application for a temporary injunction is unduly and unreasonably postponed, the defendant is justified in moving for the dissolution of such order, and counsel fees incurred in that behalf may be recovered.<sup>15</sup> And where, after a motion for a preliminary injunction has been argued and granted, complainant takes a voluntary dismissal of his bill, counsel fees incurred by defendant may be recovered although the dissolution was the result of the voluntary dismissal by complainant.<sup>16</sup> In Missouri it is held that counsel fees are recoverable upon the dissolution of a temporary injunction upon final hearing, whether or not a formal motion to dissolve has been made, where the hearing upon a motion to dissolve, had one been had, would necessarily have presented all the material issues of the case and would have rendered it necessary to dispose of the entire controversy upon such motion.<sup>17</sup>

§ 1686 *a*. **Authorities conflicting where injunction sole relief sought.** Where the injunction is the sole relief sought by the bill and a preliminary injunction is dissolved upon the final hearing of the cause upon the merits, the authorities are directly in conflict as to whether counsel fees incurred in procuring such a dissolution may be recovered. Upon the one hand it is held that the services rendered and the expense incurred are in the general defense of the action and are for the purpose of

<sup>13</sup> *Curtiss v. Bachman*, 110 Cal., 433, 42 Pac., 910, 52 Am. St. Rep., 111.

<sup>14</sup> *Carnes v. Heimrod*, 45 Neb., 364, 63 N. W., 809.

<sup>15</sup> *Gyger v. Courtney*, 59 Neb., 555, 81 N. W., 437.

<sup>16</sup> *Frahm v. Walton*, 130 Cal., 396, 62 Pac., 618.

<sup>17</sup> *Hammerslough v. Kansas City B. L. & S. Association*, 79 Mo., 80; *Brownlee v. Fenwick*, 103 Mo., 421, 15 S. W., 611; *Holloway v. Holloway*, 103 Mo., 274, 15 S. W., 536.

ridding the defendant not of the injunction but of the suit itself, and that as they thus result from the action and not from the injunction, they are not recoverable.<sup>18</sup> Upon the other hand it is held that, although such services are rendered in the general defense of the action, they may nevertheless be recovered, since services rendered in the general defense of the cause, where the injunction is the sole relief sought, are precisely the same as those which would be rendered upon a motion to dissolve.<sup>19</sup> The latter view is supported by a slight preponderance of authority.

§ 1687. **When allowed for final hearing; not allowed for appeal.** Where a motion for a dissolution is properly made by defendant and is denied, not upon the merits, but because the court in its discretion declines to go into the merits before the final hearing, and upon such final hearing the injunction is dissolved, the expenses of the motion to dissolve are properly allowable as damages. And in such case, the final trial being necessary to dissolve the injunction and defendant being required to submit to it until such hearing, counsel fees for the trial may be allowed.<sup>20</sup> So counsel fees have been allowed for a motion to dissolve when made in good faith, although the court declined to hear the motion and did not dissolve the injunction until the final hearing.<sup>21</sup> And where an injunction is the only relief prayed in the bill, counsel fees incurred in an unsuccessful attempt to dissolve the injunction are recoverable where it

<sup>18</sup> *San Diego Water Co. v. Pacific Coast Steamship Co.*, 101 Cal., 216, 35 Pac., 651; *Lawrence v. Traner*, 136 Ill., 474, 27 N. E., 197; *Lambert v. Alcorn*, 144 Ill., 313, 33 N. E., 53, 21 L. R. A., 611; *Milligan v. Nelson*, 188 Ill., 139, 58 N. E., 938; *Tyler v. Hamilton*, 108 Ky., 120, 55 S. W., 920.

<sup>19</sup> *Swan v. Timmons*, 81 Ind., 243; *Thomas v. McDanel*, 77 Iowa, 299, 42 N. W., 301; *Colby v. Meserve*, 85 Iowa, 555, 52 N. W.,

499; *Creek v. McManus*, 13 Mont., 152, 32 Pac., 675; *Jamison v. Du-laney*, 74 Miss., 890, 21 So., 972. See *Creek v. McManus*, 17 Mont., 445, 43 Pac., 497, which it is difficult, if not impossible, to reconcile with *Creek v. McManus*, *supra*.

<sup>20</sup> *Andrews v. Glenville Woolen Co.*, 50 N. Y., 282.

<sup>21</sup> *Wallace v. York*, 45 Iowa, 81. But see *Allen v. Brown*, 5 Lans., 511.

is finally adjudicated, by reason of the voluntary dismissal of the bill, that plaintiff was not entitled to the writ.<sup>22</sup> And where injunctive relief is the sole relief sought and a demurrer to the bill reaches the injunction as effectually as a motion to dissolve, it is not necessary that a formal motion to that effect be made.<sup>23</sup> But the fees should be limited to services in procuring a dissolution in the court below, and should not include services upon an appeal after the dissolution of the injunction.<sup>24</sup>

§ 1688. **Limitations upon the general doctrine.** It is improper to allow as damages counsel fees for the expense incurred in trying the entire cause, irrespective of the injunction, and the fees should be limited to such as pertain to the dissolution.<sup>25</sup>

<sup>22</sup> *Nielsen v. City of Albert Lea*, 87 Minn., 285, 91 N. W., 1113. But it is otherwise where the injunction is ancillary to other relief. *Lamb v. Shaw*, 43 Minn., 507, 45 N. W., 1134. See, *contra*, *Curtiss v. Bachman*, 110 Cal., 433, 42 Pac., 910, 52 Am. St. Rep., 111, where it is held that counsel fees for services rendered upon an unsuccessful motion to dissolve a preliminary injunction are not recoverable, although the action is ultimately dismissed upon final hearing.

<sup>23</sup> *Anderson v. Provident L. & T. Co.*, 26 Wash., 192, 66 Pac., 415.

<sup>24</sup> *Ellwood M. Co. v. Rankin*, 70 Iowa, 403, 30 N. W., 677. And see *Barre Water Co. v. Carnes*, 68 Vt., 23, 33 Atl., 898. See, *contra*, *Bolling v. Tate*, 65 Ala., 417; *French P. & O. Co. v. Porter*, 134 Ala., 302, 32 So., 678, 92 Am. St. Rep., 31. As to the right to counsel fees for procuring a partial dissolution or a modification of the injunction, see *Ford v. Loomis*, 62 Iowa, 586, 16 N. W., 193, 17 N. W., 910.

<sup>25</sup> *Elder v. Sabin*, 66 Ill., 126; *Blair v. Reading*, 99 Ill., 600; *Walker v. Pritchard*, 135 Ill., 103, 25 N. E., 573, 11 L. R. A., 577; *Landis v. Wolf*, 206 Ill., 392, 69 N. E., 103; *Bustamente v. Stewart*, 55 Cal., 115; *Curtiss v. Bachman*, 110 Cal., 433, 42 Pac., 910, 52 Am. St. Rep., 111; *Hill v. Thomas*, 19 S. C., 230; *Garlington v. Copeland*, 43 S. C., 389, 21 S. E., 317; *Olds v. Cary*, 13 Ore., 362, 10 Pac., 786; *Bolling v. Tate*, 65 Ala., 417; *Newton v. Russell*, 87 N. Y., 527; *Randall v. Carpenter*, 88 N. Y., 293; *Campbell v. Metcalf*, 1 Mont., 378; *Tabor v. Clark*, 15 Col., 434, 25 Pac., 181; *Brown v. Baldwin*, 121 Mo., 126, 25 S. W., 863; *Lamb v. Shaw*, 43 Minn., 507, 45 N. W., 1134; *Bullard v. Harkness*, 83 Iowa, 373, 49 N. W., 855; *Leonard v. Central Insurance Co.*, 101 Iowa, 482, 70 N. W., 629; *Trester v. Pike*, 60 Neb., 510, 83 N. W., 676; *Cunningham v. Finch*, 63 Neb., 189, 88 N. W., 168; *Jameson v. Bartlett*, 63 Neb., 638, 83 N. W., 860.

And the court should only allow a fair and reasonable compensation to defendant, in assessing his damages upon a dissolution, for money actually paid to counsel or for a liability fairly and honestly incurred in procuring the dissolution. Nor should fees be allowed for other services than those pertaining to the dissolution, nor when defendant has managed his own case, and when he has neither paid nor become liable for any fees.<sup>26</sup> Nor should fees be allowed as damages where the services were gratuitously rendered with no intention that they should ever be charged against the defendant.<sup>27</sup> And where no counsel fees have been paid, the defendant, a municipal corporation, defending by its salaried attorney without fee for his services, no counsel fees should be allowed.<sup>28</sup> Nor can defendant lay the foundation for larger damages by employing an unnecessary number of counsel.<sup>29</sup> But to warrant a court in the allowance of counsel fees for procuring a dissolution, it would seem not to be necessary that the fees should have been actually paid; it will suffice that the services have been rendered and the liability incurred.<sup>30</sup> It must, however, be shown that the services were actually rendered and that they were equal to the amount allowed, and such evidence should be preserved in the record.<sup>31</sup> And fees will not be allowed in the absence of proof of payment

<sup>26</sup> *Jevne v. Osgood*, 57 Ill., 340.

<sup>27</sup> *Scheming v. Cofer*, 97 Ala., 726, 12 So., 414.

<sup>28</sup> *Uhrig v. St. Louis*, 47 Mo., 528; *Nixon v. City of Biloxi*, 76 Miss., 810, 25 So., 664. And under the statute of Illinois allowing damages upon the dissolution of injunctions, fees to counsel who have rendered services *ex officio*, such as the attorney-general of the state, or the public prosecutor, can not be allowed as damages. *Wilson v. Weber*, 3 Bradw., 125.

<sup>29</sup> *Collins v. Sinclair*, 51 Ill., 328; *Hotchkiss v. Platt*, 8 Hun, 46.

<sup>30</sup> *Garrett v. Logan*, 19 Ala., 344; *McRae v. Brown*, 12 La. An., 181; *Meaux v. Pittman*, 35 La. An., 360; *Underhill v. Spencer*, 25 Kan., 71; *Wittich v. O'Neal*, 22 Fla., 592; *Brown v. Jones*, 5 Nev., 374; *Noble v. Arnold*, 23 Ohio St., 264; *Anderson v. Provident L. & T. Co.*, 26 Wash., 192, 66 Pac., 415. But see, *contra*, *Wilson v. McEvoy*, 25 Cal., 169; *Prader v. Grimm*, 28 Cal., 11.

<sup>31</sup> *Delahanty v. Warner*, 75 Ill., 185.

or of any liability or charge actually incurred therefor.<sup>32</sup> But when, upon dissolving an injunction, damages have been allowed defendant for counsel fees, the fact that the attorney appeared in the court below and argued the motion to dissolve may be taken as sufficient evidence of a retainer.<sup>33</sup>

§ 1689. **Fees after dissolution not allowed.** When the bond is conditioned for the payment of all damages sustained by suing out an injunction if the same is dissolved, it is not proper to allow counsel fees for services rendered in the progress of the cause to a final decree after dissolution, since such fees are not properly damages occasioned by suing out the injunction; they will not, therefore, be allowed as damages, even though the object of the suit is to obtain a perpetual injunction.<sup>34</sup>

§ 1690. **Further limitations.** While, as has thus been shown, counsel fees pertaining to the dissolution are properly allowable in assessing damages, yet the damages on this account should be limited to such legal services as are necessary to procure a dissolution, and should not include services upon a cross-bill filed by defendant, which raises other issues than those pertaining to the injunction and which are not necessary to its determination.<sup>35</sup> And when no expenses are incurred by the dissolution which are separable from and not chargeable as the necessary expenses incurred by defendants in revesting themselves with title to the lands in controversy by a cross-bill, no damages should be allowed upon dissolution.<sup>36</sup>

§ 1691. **City enjoined from collecting taxes.** Where a city is enjoined from the collection of taxes to pay interest upon its bonds, upon dissolving the injunction it is proper to allow

<sup>32</sup> *Packer v. Nevin*, 67 N. Y., 550; see *Spring v. Collector of Olney*, 78 Ill., 101.

<sup>33</sup> *Directors v. Trustees*, 66 Ill., 247. As to the amount to be allowed as counsel fees, when the only service rendered was in presenting to the court, upon the motion for dissolution, the question

<sup>34</sup> *Robertson v. Robertson*, 58 Ala., 68; *Porter v. Hopkins*, 63 Cal., 53.

<sup>35</sup> *Alexander v. Colcord*, 85 Ill., 323.

<sup>36</sup> *Wilson v. Haecker*, 85 Ill., 349.

of the construction of a statute,

reasonable damages, including counsel fees; and the fact that one of the city's attorneys is himself interested in such bonds will not deprive the city of its right to damages.<sup>37</sup>

§ 1692. **Not allowed when injunction expires by its terms; contingent fee not allowed.** In an action upon the bond counsel fees for dissolving the injunction will not be allowed when it expired by its own terms and by operation of law, and when no steps were taken to procure its dissolution, and no expenses incurred for counsel fees.<sup>38</sup> Nor can a contract for a contingent or speculative fee for services as counsel be made the basis on which to charge the adverse party in an assessment of damages upon the dissolution of an injunction, since such assessment must rest upon equitable grounds and can not exceed the damages actually sustained.<sup>39</sup>

§ 1692 *a*. **Bond given in federal court; counsel fees recoverable in state court, although not allowed in federal court.** The fact that counsel fees are not allowed as damages in the federal courts does not preclude a recovery of such damages in an action brought in a state court upon an injunction bond which was given in a federal court. In such case the bond is held to be given to secure the payment of the damages sustained regardless of the particular rules of practice or procedure of the court in which it was given, and the bondsmen can not be held to have contracted with the understanding that the action, if brought at all, would be in the federal court, or that their liability would be fixed by the view which that court might take of the law.<sup>40</sup>

<sup>37</sup> *Mason v. City of Shawnee-*  
*town*, 77 Ill., 533.

<sup>38</sup> *Kittle v. De Lamater*, 7 Neb.,  
70.

<sup>39</sup> *Hedges v. Meyers*, 5 Bradw.,  
347.

<sup>40</sup> *Mitchell v. Hawley*, 79 Cal.,  
301, 21 Pac., 833; *Mulvane v. Tul-*  
*lock*, 58 Kan., 622, 50 Pac., 897;  
*Missouri, K. & T. Ry. Co. v. Smith*,  
154 Mo., 300, 55 S. W., 470.

## CHAPTER XXXIV.

### OF APPEALS.

I. APPEALS FROM THE GRANTING OF INJUNCTIONS.....	§ 1693
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#### I. APPEALS FROM THE GRANTING OF INJUNCTIONS.

- § 1693. Appeal not usually allowed independent of statute.
- 1694. Question dependent upon statute.
- 1695. The doctrine in Louisiana.
- 1696. Appellate courts averse to interfering with action of court below; exceptions to rule.
- 1697. When bill taken as true; affidavits should be preserved.
- 1698. Effect of appeal as to act enjoined.
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- 1699. Effect of writ of error from United States Supreme Court.
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- 1701. Effect of appeal on power of inferior court.
- 1701a. Dismissal of appeal; act done pending appeal; expiration of patent; payment of taxes sought to be enjoined; act authorized by legislature pending appeal.
- 1701b. Dismissal of appeal on merger of temporary injunction in final decree.

§ 1693. **Appeal not usually allowed independent of statute.** The right of appeal from an order of a court of original jurisdiction, granting or refusing an interlocutory injunction, has given rise to much apparent conflict of authority. Such conflict is, however, largely due to the difference in legislation prevailing in the different states touching the right of appeal in general, and the nature or character of the order from which an appeal will lie. Independent of legislation, and upon principle as well as authority, it is believed that the true doctrine is, that an order either granting or refusing a preliminary injunction, being merely an interlocutory order, made during the progress of the cause, does not partake of the nature of a final



judgment or decree to such an extent as to warrant an appeal therefrom, or to justify a court of review in revising the action of the inferior court upon such question.<sup>1</sup> Even in those states where a different rule prevails, as the result of legislation, courts of appellate powers, as will hereafter be shown, have been exceedingly jealous of any interference with the action of the court below. And since an order granting a preliminary injunction is interlocutory in its nature, and not subject to review upon appeal, an appellate court will not, upon appeal from a final decree in the main cause, revise or consider the action of the court below in imposing terms as a condition to granting an interlocutory injunction.<sup>2</sup> But a decree which gives to plaintiff the principal relief sought by his bill and which perpetually enjoins defendants from doing the act in question is a final decree from which an appeal will lie.<sup>3</sup> And where, upon a motion for a preliminary injunction, the court not only denies the injunction but enters a decree which finally settles the rights of the parties and in effect determines that the plaintiff is not entitled to the relief sought by the bill, such an order partakes of the nature of finality to such an extent that an appeal will lie.<sup>4</sup> But a statute authorizing an appeal from an

<sup>1</sup> *Marble v. Bonhotel*, 35 Ill., 240; *Hobart v. Ford*, 6 Nev., 77; *Miller v. O'Bryan*, 36 Ark., 200; *Shoemaker v. Entwisle*, 1 App. D. C., 252; *South Bound R. R. Co. v. Am. T. & T. Co.*, 58 S. C., 21, 35 S. E., 797; *Alston v. Limehouse*, 60 S. C., 559, 39 S. E., 188; *Basche v. Pringle*, 21 Ore., 24, 26 Pac., 863; *Fowle v. House*, 26 Ore., 587, 39 Pac., 5; *United States H. Co. v. Iron Molders' Union*, 129 Mich., 354, 88 N. W., 889. So also of an order refusing to dissolve a preliminary injunction already granted. *Belcher v. Steele*, 97 Tenn., 406, 37 S. W., 135; *Johnstone v. Eisenbeis*, 1 Wash., 259, 24 Pac., 446. And see

*Hilbish v. Catherman*, 60 Pa. St., 444; *Glass v. Clark*, 41 Ga., 544; *Wells v. Coleman*, 53 Cal., 416; *Raymond v. Conger*, 51 Tex., 536; *Northern Pacific R. Co. v. Wells, Fargo & Co.*, 2 Wash., 303.

<sup>2</sup> *Hanford v. Blessing*, 80 Ill., 188.

<sup>3</sup> *Smith v. Walker*, 57 Mich., 456, 22 N. W., 267, 24 N. W., 830, 26 N. W., 783; *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.*, 61 Mich., 9, 27 N. W., 715. See *Hodges v. McDuff*, 69 Mich., 76, 36 N. W., 704.

<sup>4</sup> *Helm v. Gilroy*, 20 Ore., 517, 26 Pac., 851.

order granting or dissolving an injunction or refusing to grant or dissolve an injunction does not authorize an appeal from a temporary restraining order granted pending the hearing of an order to show cause why a temporary injunction should not issue.<sup>5</sup>

§ 1694. **Question dependent upon statute.** In determining, however, whether an appeal will lie from an order granting or continuing an interlocutory injunction, the question must ultimately be controlled by the legislation of the particular state, rather than by any general principle. Thus, under a former statute in New York, which enacted that all persons aggrieved by any sentence, judgment, decree or order of the court of chancery might appeal from the same, or any part thereof, an order continuing an injunction after answer, with costs for resisting a motion to dissolve, was held to fall within the terms of the statute and an appeal was sustained from such order.<sup>6</sup>

<sup>5</sup> *Wetzstein v. B. & M. Co.*, 25 Mont., 135, 63 Pac., 1043; *Maloney v. King*, 25 Mont., 256, 64 Pac., 688. And see, *post*, § 1708.

<sup>6</sup> *McVickar v. Wolcott*, 4 Johns., 510. The following observations of Spencer, J., embody the reasons for sustaining the right of appeal in such a case: "This appeal is from an order of the court of chancery, continuing an injunction after answer, and directing the payment of costs by the appellants to the respondents for resisting the motion to dissolve the injunction issued on filing the bill. It has been objected preliminarily that no appeal is maintainable upon an order like the present. The twenty-second article of the constitution and the eighth section of the act regulating proceedings on appeal and error have been cited. The constitution does not profess to

specify any regulations upon the subject, but directs that a court shall be instituted for the trial of impeachments and the correction of errors, under the regulations which shall be established by the legislature. The section of the statute referred to declares that all persons aggrieved by any sentence, judgment, decree or order of the court of chancery or court of probate may appeal from the same, or any part thereof, to this court. The decision of the chancellor, in denying a dissolution of the injunction, directing it to be retained, and awarding costs against the appellants, brings this case within the terms of the statute. An order of that court has intervened, in relation to which the appellants are aggrieved by the payment of costs, if that order is not justified on legal principles. That

But the doctrine in New York now is that the granting, continuing or dissolving a temporary injunction rests in the discretion of the court to which the application is made, and the exercise of such discretion will not be disturbed, unless it clearly appears from the bill or complaint that the plaintiff is not, in any view of the case, entitled to a final injunction.<sup>7</sup> And where the reviewing court declines to interfere, the appeal is properly dismissed.<sup>8</sup> But where there are no controverted facts and only questions of law are involved, an appeal will lie from an order denying a temporary injunction.<sup>9</sup> And in New Jersey it is held that all orders granting, refusing, sustaining or dissolving injunctions are appealable, unless in exceptional cases where an order is so temporary in its operation, or so slightly affects the interest of the party on whom it operates, that he can not be said to be aggrieved.<sup>10</sup> So under the present code of Iowa it would seem that an appeal lies from an order either granting or refusing an interlocutory injunction.<sup>11</sup>

orders may be appealed from, it is now too late to controvert; the practice of this court, in hearing such appeals in a variety of cases, has given a construction to the statute not to be shaken. Without undertaking to draw the line between such orders as may or may not be appealed from, in my opinion this is an order from which an appeal lies. In coming to a decision on a motion before the court of chancery, there must necessarily have been an examination into the merits of the case, as disclosed by bill and answer, and the appellants have sustained a *gravamen* in the payment of costs." But for the doctrine of the New York courts under later statutes, see *Paul v. Munger*, 47 N. Y., 469; *People v. Schoonmaker*, 50 N. Y., 499.

<sup>7</sup> *McHenry v. Jewett*, 90 N. Y.,

58; *Strasser v. Moonelis*, 108 N. Y., 611, 15 N. E., 730; *Hudson River Tel. Co. v. W. T. & R. Co.*, 121 N. Y., 397, 24 N. E., 832; *MacLaury v. Hart*, 121 N. Y., 636, 24 N. E., 1013; *Young v. Rondout & K. G. L. Co.*, 129 N. Y., 57, 29 N. E., 83; *Castoriano v. Dupe*, 145 N. Y., 250, 39 N. E., 1065; *Schneider v. City of Rochester*, 155 N. Y., 619, 50 N. E., 291.

<sup>8</sup> *Hudson River Tel. Co. v. W. T. & R. Co.*, 121 N. Y., 397, 24 N. E., 832; *Young v. Rondout & K. G. L. Co.*, 129 N. Y., 57, 29 N. E., 83; *Castoriano v. Dupe*, 145 N. Y., 250, 39 N. E., 1065; *Schneider v. City of Rochester*, 155 N. Y., 619, 50 N. E., 291.

<sup>9</sup> *White v. Inebriates Home*, 141 N. Y., 123, 35 N. E., 1092.

<sup>10</sup> *Morgan v. Rose*, 7 C. E. Green, 583.

<sup>11</sup> *Bennett v. Hetherington*, 41

§ 1695. **The doctrine in Louisiana.** In Louisiana it is held that while an appellate court will not interfere by anticipation with the exercise of the judicial discretion of an inferior court upon an application for an injunction, it will yet revise the judgment of such court after it has acted, to determine whether that discretion has been properly exercised.<sup>12</sup> And if the court below refuses to allow an appeal from its order refusing an interlocutory injunction, when such appeal should be granted, it is held that *mandamus* will lie to compel the court to grant an appeal.<sup>13</sup>

§ 1696. **Appellate courts averse to interfering with action of court below; exceptions to rule.** It is, however, worthy of note that even in those states where the right of appeal is recognized from an order of a court of original jurisdiction granting or refusing an interlocutory injunction, courts of review or of appellate jurisdiction interfere with extreme reluctance with the action of the inferior court. Treating the power of granting interlocutory injunctions as resting in a sound judicial discretion, the courts of appellate jurisdiction are averse to any interference with the exercise of that discretion. And to such an extent is this aversion manifest, that it may be stated as a general rule prevailing in states where appeals are allowed from orders granting or refusing injunctions *in limine*, that the appellate or revisory tribunal will not interfere with or

Iowa, 142. In Delaware, where the right of appeal is given to the supervisory court "from any interlocutory or final orders or decrees of the chancellor," the somewhat novel doctrine is held that an order for an injunction *pendente lite* can not be appealed from if it be such an order as a court of equity, under its established rules, may properly issue; but that, if the court has gone beyond its established rules and attempted to enjoin something which equity never

before enjoined, an appeal may be had from such interlocutory order. *Tatem v. Gilpin*, 1 Del. Ch., 13. As to the right of appeal from an order granting an interlocutory injunction under the code of procedure of South Carolina, see *Garlington v. Copeland*, 25 S. C., 41.

<sup>12</sup> *Beebe v. Guinault*, 29 La. An., 795.

<sup>13</sup> *State v. Judges of the Superior District Court*, 26 La. An., 550; *Same v. Same*, 28 La. An., 902.

control the action of the court below in such matters unless it has been guilty of a clear abuse of that discretion; and by abuse of discretion within the meaning of the rule is meant an error in law committed by the court.<sup>14</sup> Unless, therefore, some

<sup>14</sup> *DeGodey v. Godey*, 39 Cal., 157; *Patterson v. Board of Supervisors*, 50 Cal., 344; *City of New Orleans v. Great Southern T. Co.*, 37 La. An., 571; *Pelzer v. Hughes*, 27 S. C., 408, 3 S. E., 781; *Mead v. Anderson*, 40 Kan., 203, 19 Pac., 708; *Moses v. Flewellen*, 42 Ga., 386; *Bonaud v. Genesi*, 42 Ga., 639; *McDonald v. Davis*, 43 Ga., 356; *Cubbridge v. Adams*, 42 Ga., 124; *Rowland v. Ransome*, 43 Ga., 390; *Smith v. Magourich*, 44 Ga., 163; *Thomas v. Stokes*, 44 Ga., 631; *Jones v. Jones*, 58 Ga., 184; *Anthony v. Stephens*, 46 Ga., 241; *Isam v. Hooks*, 46 Ga., 309; *Davis v. Weaver*, 46 Ga., 626; *Oberholser v. Greenfield*, 47 Ga., 530; *Schaefer v. Hunnewell*, 47 Ga., 660; *Parker v. Green*, 49 Ga., 624; *Washington & I. Ry. Co. v. Coeur D'Alene R. & N. Co.*, 2 Idaho, 439, 17 Pac., 142; *Bennett Bros. Co. v. Congdon*, 20 Mont., 208, 50 Pac., 556; *Butte & Boston C. M. Co. v. M. O. P. Co.*, 21 Mont., 539, 52 Pac., 375; *Dickson v. Dows*, 11 N. Dak., 404, 92 N. W., 797; *Reeves v. Oliver*, 3 Okla., 62, 41 Pac., 353; *Walker v. Backus H. Co.*, 97 Wis., 160, 72 N. W., 230; *Thompson v. Nelson*, 18 C. C. A., 137, 71 Fed., 339; *Ritter v. Ulman*, 24 C. C. A., 71, 78 Fed., 222; *Societe Anonyme v. Allen*, 33 C. C. A. 282, 90 Fed., 815; *Centaur Co. v. Marshall*, 38 C. C. A., 413, 97 Fed., 785; *Paris Medicine Co. v. Hill Co.*, 42 C. C. A., 227, 102 Fed., 148; *Murray v. Bender*, 48 C. C. A., 555, 109 Fed., 585; *United States Gramophone Co. v. Seaman*, 51 C. C. A., 419, 113 Fed., 745; *Stearns-Rogers Mfg. Co. v. Brown*, 52 C. C. A., 559, 114 Fed., 939. See also *Gullatt v. Thrasher*, 42 Ga., 429; *Bridwell v. McNair*, 43 Ga., 176; *Hill v. Sledge*, 51 Ga., 539; *Mason v. Kirkpatrick*, 77 Ga., 492; *Empire Loan & Building Association v. City of Atlanta*, 77 Ga., 496; *Wilcoxon M. Co. v. Atkinson*, 78 Ga., 338; *Georgia Slate Co. v. Davitte*, 79 Ga., 627, 4 S. E., 873. In *Bonaud v. Genesi*, 42 Ga., 639, *McCay, J.*, says, p. 640: "The granting or refusing injunctions is in the wise discretion of the chancellor. His judgment is not error unless he acts illegally. This court, as we have said in many cases, is not a court of appeals to re-hear questions of fact and judge of them *de novo*. It is only when the court below acts illegally that this court will reverse the judgment. We desire to say that in the granting and refusing injunctions, until the hearing, the judge of the superior court is clothed by the law with a discretion. If this court undertakes to reverse his judgment simply because we think the burden of the case is, on the facts, against his judgment, we should be ourselves assuming an original jurisdiction not granted to this court. The judges of the superior court should be careful in these matters,

established rule of law or principle of equity has been violated, the action of the court below will not be interfered with upon such an appeal.<sup>15</sup> Nor will the appellate court upon such an appeal ordinarily revise or control the discretion of the court below upon questions of conflicting evidence when, after hearing such evidence, that court has granted or refused a preliminary injunction.<sup>16</sup> So where the action of the lower court in granting or refusing a preliminary injunction was based upon conflicting affidavits for and against the motion, such action will not be disturbed upon appeal unless it appears upon the facts found that the writ was improvidently granted.<sup>17</sup> And in such case the reviewing court will refuse to interfere, although, were the case before them upon final hearing, they would be obliged to find differently upon the same proofs.<sup>18</sup> But the rule that the granting or denying of a preliminary injunction involves such an exercise of judgment upon the part of the chancellor as will not be disturbed upon appeal does

examine patiently and cautiously the facts, and act with deliberation and wisdom. We will always assume they have so done, and will not disturb the judgment on the facts, except in a clear case of mistake, misapprehension or error of law." And it is held in California that the refusal of an application for a rule to show cause why an injunction should not be granted is not "an order refusing or granting an injunction" within the meaning of the code of that state, and therefore no appeal will lie from such order. *Grant v. Johnston*, 45 Cal., 243.

<sup>15</sup> *Jones v. Thacher*, 48 Ga., 83; *Collier v. Sapp*, 49 Ga., 93; *Higginson v. C., B. & Q. R. Co.* 42 C. C. A., 254, 102 Fed., 197; *Kerr v. City of New Orleans*, 61 C. C. A., 450, 126 Fed., 920.

<sup>16</sup> *Carter v. Hallahan*, 59 Ga., 67; *Nevin v. Printup*, *Ib.*, 281; *Smith v. McLaren*, *Ib.*, 879; *Harris v. Western & Atlantic R. Co.*, 59 Ga., 830; *Augusta Ice Co. v. Gray*, 60 Ga., 344; *Morris v. Barnwell*, *Ib.*, 147; *Mayor v. Huff*, *Ib.*, 221; *Parrot Silver & C. Co. v. Heinze*, 24 Mont., 485, 62 Pac., 818; *Montana Ore P. Co. v. B. & B. C. M. Co.*, 25 Mont., 427, 65 Pac., 420; *Southern Pacific Co. v. Earl*, 27 C. C. A., 185, 82 Fed., 690.

<sup>17</sup> *Workingmen's Amalgamated Council v. United States*, 6 C. C. A., 258, 57 Fed., 85; *Home E. L. & P. Co. v. Globe T. P. Co.*, 146 Ind., 673, 45 N. E., 1108.

<sup>18</sup> *West Coast Improvement Co. v. Winsor*, 8 Wash., 490, 36 Pac., 441.

not apply to cases involving questions of law arising upon the face of the bill.<sup>19</sup> And where it appears from the nature of the case and from all the facts that plaintiff is not entitled to an injunction, it is an abuse of discretion to issue the writ, and the action of the court in so doing will be reversed upon appeal.<sup>20</sup> So where the lower court, upon a motion to dissolve a temporary injunction, has refused, through error in applying the rules of the law of evidence, to hear testimony offered by plaintiff by which alone the allegations of the bill may be sustained, there has been no proper exercise of its discretion upon the part of that court and its action in dissolving a preliminary will be reversed upon appeal.<sup>21</sup>

§ 1697. **When bill taken as true; affidavits should be preserved.** Upon an appeal from an order granting an interlocutory injunction upon a bill duly verified, where such appeal is allowed, the allegations of the bill are to be taken as *prima facie* true.<sup>22</sup> And when an appeal is allowed from an interlocutory order granting an injunction, the appellate court will not review the action of the court below when the affidavits and evidence upon which the injunction was granted are not preserved by the bill of exceptions.<sup>23</sup> So upon a writ of error to reverse the action of an inferior court upon the hearing of a motion for an injunction, the affidavits used upon the motion should be incorporated into the bill of exceptions, and if only attached to or embraced in the record, without identification by the court below, the writ of error may be dismissed.<sup>24</sup>

§ 1698. **Effect of appeal as to act enjoined.** Where under the practice of the state an appeal is allowed from an order granting an interlocutory injunction and appointing a receiver

<sup>19</sup> Burlington, C. R. & N. Ry. Co. v. Dey, 82 Iowa, 312, 48 N. W., 98, 12 L. R. A., 436, 31 Am. St. Rep., 477.

<sup>20</sup> Schilling v. Reagan, 19 Mont., 508, 48 Pac., 1109.

<sup>21</sup> Bennett Bros Co. v. Congdon, 20 Mont, 208, 50 Pac., 556.

<sup>22</sup> Freshwater v. Pittsburg, W. & K. R. Co., 6 West Va., 503.

<sup>23</sup> Turnbull v. Ellis, 35 Ind., 422; Carver v. Carver, 44 Ind., 265.

<sup>24</sup> Taylor v. Cook, 51 Ga., 215.

*pendente lite*, if a *supersedeas* is granted upon the appeal it has the effect of suspending the order.<sup>25</sup> But an appeal from an order granting a preliminary injunction does not have the effect of authorizing the doing of the act or thing enjoined; since if it were allowed such effect, there would be no material advantage in obtaining an injunction in any case, as it would be in the power of the defendant to avoid its effect by appealing.<sup>26</sup> And where, under the practice of the state, an appeal is allowed from an order refusing an interlocutory injunction, such appeal does not operate as a *supersedeas* as against the act sought to be enjoined; since to give the appeal such effect would be to perpetuate and continue an injunction which was sought but not granted.<sup>27</sup>

§ 1698 *a*. **The same; rule as to mandatory injunctions.** The doctrine is now well established that an appeal from a final decree granting a perpetual injunction and the giving of a *supersedeas* bond will not have the effect of nullifying or suspending the decree, so as to permit the doing of the act enjoined pending the appeal.<sup>28</sup> And, in such case, the court which granted the injunction still has power to punish its violation, notwith-

<sup>25</sup> *State v. Johnson*, 13 Fla., 33.

<sup>26</sup> *State v. Chase*, 41 Ind., 356; *Green v. Griffin*, 95 N. C., 50; *Klinck v. Black*, 14 S. C., 241; *State v. Stallcup*, 15 Wash., 263, 46 Pac., 251. So, where the appeal is taken from an order which is not appealable. *State v. District Court*, 52 Minn., 283, 53 N. W., 1157. And see this case to the effect that an order granting an injunction *ex parte* is not appealable where defendant fails to make an application to have it set aside.

<sup>27</sup> *Troupe v. Eade*, 42 Iowa, 552.

<sup>28</sup> *Hovey v. McDonald*, 109 U. S., 150, 3 Sup. Ct. Rep., 136; *Leonard v. Ozark Land Co.*, 115 U. S., 465, 6 Sup. Ct. Rep., 127, affirming

*Ozark Land Co. v. Leonard*, 24 Fed., 658; *Knox County v. Harshman*, 132 U. S., 14, 10 Sup. Ct. Rep., 8; *Heinlein v. Cross*, 63 Cal., 44; *Dewey v. Superior Court*, 81 Cal., 64, 22 Pac., 333; *Bullion, Beck & C. M. Co. v. E. H. Mining Co.*, 5 Utah, 151, 13 Pac., 174; *Ex parte Whitmore*, 9 Utah, 441, 35 Pac., 524; *Kentucky & I. B. Co. v. Krieger*, 91 Ky., 625, 16 S. W., 824. See also *Slaughter House Cases*, 10 Wal., 273; *Central Union T. Co. v. State*, 110 Ind., 203, 10 N. E., 922, 12 N. E., 136; *State v. Dillon*, 96 Mo., 56, 8 S. W., 781. And see 93d rule in equity of United States courts.



standing the appeal.<sup>29</sup> But the rule as thus announced applies only to prohibitory injunctions, and where the decree appealed from grants a mandatory injunction or one which, although prohibitory in form, is mandatory in substance, the rule is equally as well established that the perfecting of an appeal from the final decree will have the effect of suspending the operation of the injunction during the pendency of the appeal, and in such case the court is without jurisdiction to punish the defendant against whom the injunction runs for failure to perform the acts required by the writ.<sup>30</sup> And in such case it is error for the court to refuse to fix the amount of a *supersedeas* bond.<sup>31</sup>

§ 1699. **Effect of writ of error from United States Supreme Court.** When injunctions are granted in a state court, which are affirmed on appeal to the supreme court of the state, and a writ of error is then sued out of the Supreme Court of the United States to reverse the judgment of the supreme court of such state, such writ of error, although made a *supersedeas* by giving the necessary bond in accordance with the acts of Congress, does not operate upon the state court in which the injunctions were first granted to stay or supersede its action, its only operation being upon the supreme court of the state. The Supreme Court of the United States will not, therefore, pending such writ of error, control or interfere with the action of the inferior state court concerning the subject-matter of the litigation.<sup>32</sup>

§ 1700. **Modification by appellate court.** It is held in Georgia that, although the court of appellate jurisdiction may

<sup>29</sup> *State v. Dillon*, 96 Mo., 56, 8 Pac., 156, 563; *Schwarz v. Superior S. W.*, 781; *Dewey v. Superior Court*, 81 Cal., 64, 22 Pac., 333; *Mark v. Superior Court*, 129 Cal., 1, 61 Pac., 436; *Elliot v. Whitmore*, 10 Utah, 238, 37 Pac., 459.  
<sup>30</sup> *Ex parte Whitmore*, 9 Utah, 441, 35 Pac., 524.

<sup>31</sup> *Elliot v. Whitmore*, 10 Utah, 238, 37 Pac., 459.  
<sup>32</sup> *Slaughter House Cases*, 10 Wal., 273.

<sup>30</sup> *Dewey v. Superior Court*, 81 Cal., 64, 22 Pac., 333; *Stewart v. Superior Court*, 100 Cal., 543, 35

be of opinion that there is no such abuse of discretion shown as to warrant it in reversing an order of the court below granting a preliminary injunction, it may nevertheless modify such injunction when this course seems necessary for better preserving the equities of the parties.<sup>33</sup> But since the question of retaining an injunction by the court below until a final hearing rests in its sound judicial discretion, the appellate tribunal will not interfere with the exercise of that discretion when the lower court has decided to retain the injunction until the hearing, especially when fraud is charged and the evidence is conflicting, even though the appellate court is of opinion that the injunction should be modified.<sup>34</sup>

§ 1701. **Effect of appeal on power of inferior court.** When a bill for injunction is dismissed upon the hearing and an appeal is taken from the final decree or order of dismissal, pending such appeal in the court of appellate jurisdiction, the original court has no power or authority over the cause in the absence of statute, and can not, therefore, grant an injunction in the cause, pending such appeal.<sup>35</sup>

§ 1701 *a*. **Dismissal of appeal; act done pending appeal; expiration of patent; payment of taxes sought to be enjoined; act authorized by legislature pending appeal.** Where an appeal is taken from an order dissolving or denying a preliminary injunction or dismissing the bill, and, pending the appeal, the act sought to be restrained has been accomplished, that fact, upon being brought to the attention of the reviewing court by motion supported by affidavit affords sufficient ground for dismissing the appeal, the dismissal being without prejudice.<sup>36</sup>

<sup>33</sup> Hill v. Sledge, 51 Ga., 539.

<sup>34</sup> Hollis v. Williams, 43 Ga., 214.

<sup>35</sup> Galloway v. The Mayor, 3 DeG., J. & S., 59; Eureka M. Co. v. Richmond M. Co., 5 Sawy., 121. But see Polini v. Gray, 12 Ch. D., 438.

<sup>36</sup> Gallaher v. Schneider, 110 Ga., 322, 35 S. E., 321; Ambos v. Rail-

way, 113 Ga., 1012, 39 S. E., 477;

Wilson v. Boise City, 7 Idaho, 69,

60 Pac., 84. And see Donaldson v. Wright, 7 App. D. C., 45, to the effect that in such case the cause should not be remanded for an injunction. But in Terhune v. Midland R. Co., 36 N. J. Eq., 318, it was held that if, under the

So the expiration of a patent pending an appeal from an injunction restraining infringement operates as a dissolution of the injunction, and the appeal should be dismissed.<sup>37</sup> So upon an appeal from a decree dismissing a bill brought to enjoin the collection of taxes, the payment of such taxes pending the appeal affords good reason for dismissing the appeal.<sup>38</sup> So the reviewing proceedings are properly dismissed where the subject-matter of the litigation has ceased to exist or has passed beyond the power or jurisdiction of the court.<sup>39</sup> And when an appeal is had from a judgment refusing an injunction, and, pending such appeal, the act which it is sought to enjoin is authorized by an act of legislature, the judgment of the court below will not be disturbed, however erroneous it may have been when rendered.<sup>40</sup> And where the right which is sought to be protected by injunction has expired pending an appeal from an order dissolving a preliminary injunction, the action of the lower court in improperly refusing relief for the protection of such right will not be disturbed upon appeal.<sup>41</sup>

practice of a state, an appeal lies from an order refusing a preliminary injunction, the fact that the thing which it is sought to enjoin may have already been accomplished will not deprive the party aggrieved of his right of appeal, and the appellate tribunal may still, in its discretion, determine the question whether an interlocutory injunction should have been granted.

<sup>37</sup> *Gamewell F. T. Co. v. Municipal Signal Co.*, 9 C. C. A., 450, 61 Fed., 208; *Lockwood v. Wickes*, 21 C. C. A., 257, 75 Fed., 118; *National Folding B. & P. Co. v. Robertson*, 44 C. C. A., 29, 104 Fed., 552.

<sup>38</sup> *Singer Mfg. Co. v. Wright*, 141 U. S., 696, 12 Sup. Ct. Rep., 103; *Tomboy G. M. Co. v. Brown*, 20 C. C. A., 264, 74 Fed., 12.

<sup>39</sup> *Knight v. Hirbour*, 64 Kan., 563, 67 Pac., 1104. In this case the court say: "While courts of equity having the parties before them may coerce obedience to their decrees, yet when the subject matter of the suit has ceased to exist, and any further order thereto has become impossible of performance, the court will not occupy itself in considering the possessory rights of the parties to the thing in dispute. In such cases the controversy resolves itself into a moot case, presenting nothing to be adjudicated except the question of costs."

<sup>40</sup> *Linn County v. Hewitt*, 55 Iowa, 505, 8 N. W., 340.

<sup>41</sup> *McInnis v. Pace*, 78 Miss., 550, 29 So., 835.

§ 1701 *b*. **Dismissal of appeal on merger of temporary injunction in final decree.** Where a preliminary injunction is granted until the further order of the court and a final decree for a perpetual injunction is afterward entered, such preliminary injunctional order becomes merged in the final decree and an appeal from the provisional order should thereupon be dismissed.<sup>42</sup>

<sup>42</sup> *Sheward v. Citizens' W. Co.*, 90 Cal., 635, 27 Pac., 439.

## II. APPEALS FROM THE DISSOLUTION OF INJUNCTIONS.

- § 1702. Conflict of authority; the general doctrine stated; doctrine in South Carolina.  
1703. The doctrine in New York.  
1704. The doctrine in Louisiana.  
1705. The doctrine in Nebraska and Missouri.  
1706. The doctrine in Illinois.  
1707. The doctrine in Iowa.  
1708. When order affirmed; temporary restraining order.  
1709. Appeal from dissolution does not revive injunction.  
1710. Effect of affirming dissolution.  
1711. Amount of appeal bond on dissolving injunction against judgment.  
1711a. Effect of appeal on undetermined motion for assessment of damages.

§ 1702. **Conflict of authority; the general doctrine stated; doctrine in South Carolina.** The same conflict of authority which has already been noted as characterizing the question of the right of appeal from the granting or refusing of an interlocutory injunction is also observable in connection with the right of appeal from an order dissolving or refusing to dissolve such an injunction; and in this case, as in the former, the conflict in question is due to the difference in legislation in the various states touching the right of appeal. In the absence, however, of express or controlling legislation governing the question, the proposition may now be regarded as well settled that the power of dissolving, like that of granting preliminary injunctions, resting in the sound judicial discretion of the court to which the application is addressed, an appeal or writ of error will not ordinarily lie to correct or reverse an order of the court below dissolving or refusing to dissolve an interlocutory injunction.<sup>1</sup> Even in states where the right of appeal from

<sup>1</sup> *Van Dewater v. Kelsey*, 1 N. Y. Spencer v. Stearns, 28 Mich., 463; 533; *Young v. Grundy*, 6 Cranch, Schuffert v. Grote, 83 Mich., 263, 51; *Buffington v. Harvey*, 5 Otto, 47 N. W., 254; *Choteau v. Rice*, 1 99; *Boinay v. Coats*, 17 Mich., 411; *Minn.*, 24; *Pickle v. Holland*, 24

such orders has been recognized, an appellate court will rarely, if ever, interfere unless the case be free from doubt or some principle of law or equity has been violated, or unless there has been an abuse of discretion on the part of the court below.<sup>2</sup> And under a statute authorizing appeals from final judgments only, an appeal will not lie from an order dissolving an interlocutory injunction and awarding costs and damages thereon.<sup>3</sup> In South Carolina it has been held that while an order granting or dissolving a temporary injunction is ordinarily not appealable,<sup>4</sup> being addressed to the discretion of the chancellor, yet where the injunction is absolutely essential to the preservation of the legal rights of the plaintiff, an appeal will lie from such an order.<sup>5</sup>

Miss., 566; *Keel v. Bently*, 15 Ill., 228; *Pentecost v. Magahee*, 4 Scam., 326; *Dickson v. Dows*, 11 N. Dak., 404, 92 N. W., 797; *Ingles v. Straus*, 91 Va., 209, 21 S. E., 490; *Mahncke v. City of Tacoma*, 1 Wash., 18, 23 Pac., 804. See also *Cornelius v. Coons*, Breese, 15 (Beecher's Edition, 37). See as to the right of appeal from the dissolution of an injunction in Louisiana, *State v. Judge of 22d Judicial District*, 37 La. An., 118; *Schmidt v. Foucher*, 37 La. An., 174; *State v. Judge Civil District Court*, 37 La. An., 825; *Puckette v. Hicks*, 39 La. An., 901, 2 So., 801.

<sup>2</sup> *Fleischman v. Young*, 1 Stockt., 620; *Garr v. Hill*, 1 Halst. Ch., 639; *Loyless v. Howell*, 15 Ga., 554; *Robenson v. Ross*, 40 Ga., 375; *Cohen v. Meyers*, 42 Ga., 46; *Clark v. Herring*, 43 Ga., 226; *Hollis v. Williams*, 43 Ga., 214; *Hart v. Mills*, 38 Tex., 513; *Parrott v. Floyd*, 54 Cal., 534; *White v. Numan*, 60 Cal., 406; *Cotter v. Cotter*, 16 Mont., 63, 40 Pac., 63.

<sup>3</sup> *Tanner v. Irwin*, 1 Mo., 47;

*Johnson v. Board of Education*, 65 Mo., 47. In *Tanner v. Irwin*, the reasons for refusing to permit appeals from such orders are very clearly stated in the opinion of the court by M'Girk, C. J., as follows: "If an appeal from an interlocutory decree in chancery were allowed, a cause would scarcely ever end, and would and might be so carved up that when the chancellor would be ready to pronounce a final decree, the fragments of the cause would be to collect, and the proceedings would be involved in endless perplexity. We are clearly of opinion the appeal is premature, and if injury has been done the chancellor will rectify it on the final hearing."

<sup>4</sup> *South Carolina & G. R. R. v. E. S. T. Co.*, 48 S. C., 315, 26 S. E., 613.

<sup>5</sup> *Strom v. American Mortgage Co.*, 42 S. C., 97, 20 S. E., 16; *Seabrook v. Mostowitz*, 51 S. C., 433, 29 S. E., 202; *Darlington Oil Co. v. P. D. Oil Co.*, 62 S. C., 196, 40 S. E., 169.

§ 1703. **The doctrine in New York.** In New York, while a different doctrine formerly prevailed under the legislation regulating the subject of appeals,<sup>6</sup> under a later statute it is held that, since the right to a preliminary injunction rests in the sound discretion of the court, an order dissolving such injunction does not affect a substantial right as the term is used in the statute giving jurisdiction to the Court of Appeals; an appeal will not, therefore, lie from such order,<sup>7</sup> especially when the injunction is merely incidental to the principal relief sought, and when the merits of the case are not disposed of by such order.<sup>8</sup> And for the same reasons, an order denying a motion to dissolve can not be reviewed on appeal.<sup>9</sup>

§ 1704. **The doctrine in Louisiana.** It is held in Louisiana, that an order overruling a motion to dissolve a preliminary injunction is an interlocutory order from which an appeal will not, ordinarily, lie.<sup>10</sup> If, however, the order of dissolution is of such a nature as to work an irreparable injury to the plaintiff, an appeal may be allowed.<sup>11</sup> And it has even been held that the court below may be compelled by *mandamus* to allow such appeal.<sup>12</sup>

§ 1705. **The doctrine in Nebraska and Missouri.** It is held in Nebraska, that in determining whether an appeal or writ of error will lie to reverse the judgment of a lower court dissolving an interlocutory injunction, the controlling point is whether the order affects a substantial right and determines the action, so that nothing further is required to dispose of the cause. And

<sup>6</sup> See *McVickar v. Wolcott*, 4 Johns., 510.

<sup>7</sup> *People v. Schoonmaker*, 50 N. Y., 499.

<sup>8</sup> *Paul v. Munger*, 47 N. Y., 469.

<sup>9</sup> *Pfohl v. Samson*, 59 N. Y., 174; *Brown v. Keeney Association*, 59 N. Y., 242; *Calkin v. Manhattan Oil Co.*, 65 N. C. 557. As to the right of appeal from an order refusing to dissolve an interlocutory injunc-

tion, under the code of Virginia, see *Kohn v. Kerngood*, 80 Va., 342.

<sup>10</sup> *Woolfolk v. Woolfolk*, 22 La. An., 206.

<sup>11</sup> *State v. Judge of Fourth District Court*, 23 La. An., 151; *State v. City of New Orleans*, 26 La. An., 304.

<sup>12</sup> *State v. Judge of Fourth District Court*, 23 La. An., 151.

when this is not the case, and the substantial rights of the parties are not yet determined, notwithstanding the dissolution, the order is not appealable.<sup>13</sup> But an order dissolving an injunction and dismissing the bill is a final order from which an appeal will lie.<sup>14</sup>

§ 1706. **The doctrine in Illinois.** In Illinois the doctrine is well established that in cases where an injunction is the only relief sought by the bill, and a motion to dissolve for want of equity in the bill is sustained by the court, the order of dissolution is such a final order as entitles the plaintiff to a writ of error or an appeal therefrom. In such cases, the motion to dissolve operates as a demurrer to the bill for want of equity, and is considered as an admission of the material allegations of the bill. The decree, therefore, dissolving the injunction, is a complete denial of the equity of the bill and of the relief sought, and the bill may be at once dismissed, and the action of the court reviewed on error or appeal.<sup>15</sup> And the same rule is applied when the injunction is the only relief sought and the motion to dissolve is heard upon bill, answer and affidavits; and in such case the dissolution of the injunction may be treated as a final disposition of the cause, from which an appeal will at once lie.<sup>16</sup>

§ 1707. **The doctrine in Iowa.** In Iowa a distinction has been drawn between cases where a dissolution of the injunction affects the merits of the cause, involving a decision upon material questions in controversy, and cases where the dissolution does not go to the merits, but affects simply collateral mat-

<sup>13</sup> *Smith v. Sahler*, 1 Neb., 310; *Kochersperger*, 173 Ill., 201, 50 N. E. 187; *Heinroth v. Kochersperger*, 173 Ill., 205, 50 N. E., 171. See also *Gardt v. Brown*, 113 Ill., 475.

<sup>14</sup> *Oberkoetter v. Luebbering*, 4 Mo. App., 481.

<sup>15</sup> *Titus v. Mabey*, 25 Ill., 232; *Shaw v. Hill*, 67 Ill., 455; *Weaver v. Poyer*, 70 Ill., 567; *Smith v.*

<sup>16</sup> *Prout v. Lomer*, 79 Ill., 331; *American Live Stock C. Co. v. Chicago Live Stock Exchange*, 143 Ill., 210, 32 N. E., 274, 18 L. R. A., 190, 36 Am. St. Rep., 385.



ters, or questions purely within the discretion of the court, the right of appeal being recognized in the former class of cases, but denied in the latter.<sup>17</sup> And it is held that, while the dissolution, like the granting of an interlocutory injunction, rests in the sound discretion of the court, yet this is a legal discretion, and if abused or exercised upon insufficient grounds, the action of the court may be reversed by the appellate tribunal.<sup>18</sup>

§ 1708. **When order affirmed; temporary restraining order.** When, under the statutes of a state, an appeal lies from an order dissolving an injunction, an order which modifies an injunction and suspends its operation in part is held to be, in effect, an order of dissolution *pro tanto* and hence appealable.<sup>19</sup> But although under the practice of the state an appeal lies from an order vacating a preliminary injunction, such an order will not be reversed on appeal unless, by a clear preponderance of evidence, it is apparent that the court below abused its discretion; and if the reasons for and against the injunction are very nearly balanced, the order will be affirmed.<sup>20</sup> And where by statute an appeal lies from an order granting, or dissolving, or refusing to dissolve an injunction, a distinction is taken between an injunction proper and a temporary restraining order, the latter being limited in its extent and operation to such reasonable time as may be necessary to notify the opposite party; and from an order dissolving such temporary restraining order no appeal will lie.<sup>21</sup>

§ 1709. **Appeal from dissolution does not revive injunction.** Upon the question whether an appeal from a decree dissolving an injunction has the effect of continuing the injunction pending the appeal, the authorities are by no means uniform, the want of harmony, however, being in part due to conflicting

<sup>17</sup> Trustees v. Davenport, 7 Iowa, 213.

<sup>20</sup> Wood v. Millsbaugh, 15 Kan., 14.

<sup>18</sup> Sinnet v. Moles, 38 Iowa, 25.

<sup>21</sup> Pleasants v. Vevay Company,

<sup>19</sup> Weaver v. Mississippi & R. R. B. Co., 30 Minn., 477, 16 N. W., 269. 42 Ind., 391. And see, *ante*, § 1693,

statute regulations or rules of practice in the various states. The better considered doctrine clearly is that such appeal does not have the effect of reviving or continuing the injunction, since the process of the court, when once discharged, can only be revived by a new exercise of judicial power. An appeal being merely the act of the party, can not, of itself, affect the validity of the order of the court, nor can it give new life and force to an injunction which the court has decreed no longer exists. It follows, therefore, that an appeal from a decree dissolving an injunction can not have the effect of reviving the injunction and of continuing in force by the mere act of the party appealing a judicial order which has been set aside.<sup>22</sup>

<sup>22</sup> Garrow v. Carpenter, 4 Stew. & P., 336; Chegary v. Scofield, 1 Halst. Ch., 525; Hoyt v. Gelston, 13 Johns., 139; Wood v. Dwight, 7 Johns. Ch., 295; Hovey v. McDonald, 109 U. S., 150, 3 Sup. Ct. Rep., 136; Knox County v. Harshman, 132 U. S., 14, 10 Sup. Ct. Rep., 8; Payne v. McCabe, 37 Ark., 318; James v. Markham, 125 N. C., 145, 34 S. E., 241; Reybourn v. Sawyer, 128 N. C., 8, 37 S. E., 954. And see Slaughter House Cases, 10 Wal., 273; Park v. Meek, 1 Lea, 78. But see, *contra*, Penrice v. Wallis, 37 Miss., 172; Yocum v. Moore, 4 Bibb, 221; Turner v. Scott, 5 Rand., 332; Williams v. Pouns, 48 Tex., 141; Balkum v. Harper's Adm'rs, 50 Ala., 372; Smith v. Western Union T. Co., 83 Ky., 269; State v. Judge Sixth District Court, 32 La. An., 1276; State v. Judge 19th Judicial District Court, 33 La. An., 133; State v. Judge 22nd Judicial District Court, 33 La. An., 760; State v. Houston, 37 La. An., 852; State v. Judge 12th District Court, 38 La. An., 31; Gulf, C. & F. R. Co. v. Fort Worth & N. O. R. Co., 68 Tex., 98, 2 S. W., 199, 3 S. W., 564. But see Fort Worth S. R. Co. v. Rosedale S. R. Co., 68 Tex., 163; 7 S. W., 381. In McMichael v. Eckman, 26 Fla., 43, 7 So., 365, it was held that an order made by the reviewing court that the appeal should operate as a *supersedeas* upon the appellant's giving proper bond had the effect of reviving and reinstating the injunction. And in Elizabethtown, etc., R. Co. v. A., etc. Ry. Co., 94 Ky., 478, 22 S. W., should operate as a *supersedeas* bond was held to have the same effect. In Minnesota it is held that an appeal has the effect of reinstating the injunction, under a statute which provides that an appeal from an order dissolving a temporary injunction should "save all rights affected thereby." State v. Duluth S. R. Co., 47 Minn., 369, 50 N. W., 332. This case is criticised in State v. District Court of Mower County, 78 Minn., 464, 81 N. W., 323, but is followed out of respect for the rule of *stare decisis*. In Hoyt v. Gelston, 13 Johns., 139, it is said *per curiam*:

The question is, however, so largely dependent upon and gov-

"In this case the injunction had been dissolved, from which order there was an appeal; and it is now urged that this appeal suspends all proceedings in this court, as much as if the injunction was still in full force. To give such effect to an appeal from an order dissolving an injunction would be very mischievous in practice, and serve as a great engine of delay. We must consider the case now in this court as if no injunction had ever issued. If the parties have committed any contempt by proceeding, application must be made to the court of chancery to punish such contempt, but that is a matter with which this court has no concern. It is enough for us that there is no existing injunction. Suppose application had been made in the first instance to the chancellor and he had refused the injunction, an appeal would have lain from such refusal; but such appeal would not tie up the proceedings at law. If an appeal was to have such an operation, applications for injunctions might be perverted to the worst of purposes." And in *Wood v. Dwight*, 7 Johns. Ch., 295, Kent, Chancellor, observes that, "if the order dissolving an injunction, or discharging a party from a writ of *ne exeat* was duly entered, no subsequent appeal by the dissatisfied party could, of itself, affect the validity of the order, or revive the process and give it force and effect. An appeal only stays future proceedings in the court; but here is no further proceeding. The order is perfect and finished *eo instanti*

that it is entered; and if the injunction could be revived by the mere act of the party in filing an appeal, it would be giving to him not only a power of control over the orders of the court, but of creating an injunction. The Supreme Court of this state in *Hoyt v. Gelston* (13 Johns. Rep., 139), held that an injunction was not revived by an appeal, so as to operate as a stay of proceedings at law; and the Supreme Court of the United States, in *Young v. Grundy*, 6 Cranch, 51, held that no appeal would even lie upon an interlocutory order dissolving an injunction. Whether an appeal can be sustained, is a question for the Court of Errors; but supposing it can be sustained, it is impossible that a process that is duly discharged, and *functus officio*, can be revived by the mere act of the party. How could this court undertake to enforce the process and punish contempts of it in the very face of the order dissolving it? When a process is once discharged and dead, it is gone forever; and it never can be revived but by a new exercise of judicial power. It is sufficient, in this case, to declare that the defendant is entitled to pursue his remedy at law, equally as if no injunction had issued; and no special leave to proceed is requisite." *A fortiori* will an appeal not have the effect of keeping an injunction in force, when none has ever been granted. *Knox County v. Harshman*, 132 U. S., 14, 10 Sup. Ct. Rep., 8.

erned by legislation or by local rules of practice that its ultimate determination in any state must ordinarily be governed by the rules of practice prevailing in that state.<sup>23</sup>

<sup>23</sup> The 93d of the Equity rules of the United States courts provides as follows: "When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party." As to the considerations governing the circuit courts of the United States in continuing an injunction in force, pending an appeal, under this rule, see *Reynolds v. Iron S. M. Co.*, 33 Fed., 354.

In Louisiana it is held that after an execution is enjoined and a suspensive appeal taken from the judgment dissolving such injunction, the court below has no power pending the appeal to order the sale of any portion of the property seized under execution, and that the injunction bond stands as a protection to plaintiff in the execution; and a writ of prohibition has been allowed, in such case, to prevent the court below from selling under the execution pending the appeal. *State v. Judge of Fifth District Court*, 25 La. An., 666.

Under the code of procedure in New York, when a temporary injunction is granted, but the bill is

dismissed upon the hearing, the court can not, pending an appeal from its judgment, grant an injunction in the same action in behalf of plaintiff and appellant for the same purpose sought by the original bill, and can not revive the original injunction pending such appeal. *Fellows v. Heermans*, 13 Ab. Pr. N. S., 1; *Spears v. Mathews*, 66 N. Y., 127. See, *contra*, *Spears v. Mathews*, 6 Hun, 489.

In New Jersey it would seem that, pending an appeal from a decree dissolving an injunction, the appellate court may grant a temporary injunction staying the proceedings to restrain which the original injunction was sought. *Chegary v. Scofield*, 1 Halst. Ch., 525; *Doughty v. Somerville & Easton R. Co.*, 3 Halst. Ch., 629. So in Iowa, upon an appeal from an order denying a preliminary injunction, a temporary injunction has been granted by the Supreme Court where, without the writ, the objects of the appeal would be defeated and the rights of appellant irreparably injured. *Norris v. Tripp*, 111 Iowa, 115, 82 N. W., 610; *dictum* in *Manning v. Poling*, 114 Iowa, 20, 83 N. W., 895, 86 N. W., 30. As to whether such a practice prevails in Florida upon an appeal from an order denying a preliminary injunction, see *Cohen v. L'Engle*, 24 Fla., 542, 5 So., 235. In Alabama, under a rule of court making it the duty of the

§ 1710. **Effect of affirming dissolution.** When an appeal is taken from an order dissolving a temporary injunction and the judgment of the court below is affirmed, such proceedings do not have the effect of terminating the action, since upon the final hearing the plaintiff may still show that he is entitled to a perpetual injunction. It is, therefore, error to dismiss the action in the court below, upon the ground that the matter has been disposed of, and plaintiff is still entitled to a final hearing.<sup>24</sup>

§ 1711. **Amount of appeal bond on dissolving injunction against judgment.** Upon an appeal from the dissolution of an injunction against a judgment at law, it is held that the amount of the appeal bond should be determined with reference to the amount of the judgment for damages upon the dissolution, and not with reference to the amount of the original judgment which was enjoined.<sup>25</sup>

§ 1711 *a*. **Effect of appeal on undetermined motion for assessment of damages.** Where, after the dissolution of a temporary injunction and the dismissal of the bill, a motion is made for the assessment of damages, an appeal may be taken although the motion is still pending and undetermined, and the appeal in such case suspends action upon the motion until the final determination of the appeal.<sup>26</sup>

chancellor upon dissolving an injunction to prescribe the penalty and condition of the bond to be given upon appeal, the execution of such bond operating under the rule to restore the injunction until reviewed by the Supreme Court, it is held that the duty thus imposed upon the chancellor is so plain and imperative as to leave no room for discretion on his part, and that

*mandamus* will lie to compel performance of such duty. *Ex parte* Planters & Merchants Mutual Insurance Co., 50 Ala., 390.

<sup>24</sup> Rayle v. Indianapolis, P. & C. R. Co., 40 Ind., 347.

<sup>25</sup> Malain v. Judge of Third Judicial District, 29 La. An., 793.

<sup>26</sup> Joplin & W. R. Co. v. K. C., F. S. & M. R. Co., 135 Mo., 549, 37 S. W., 540.

## III. APPEALS UNDER COURT OF APPEALS ACT.

- § 1712. Appeals from interlocutory injunctions allowed under act of March 3, 1891, and subsequent acts.
1713. Limited to cases where appeals would lie from a final decree.
1714. Order refusing to modify or dissolve not appealable; otherwise if order continues injunction.
1715. Partial dismissal of bill in patent suit; no appeal by complainant.
1716. When court may grant interlocutory injunction to enable defendant to appeal.
1717. Staying effect of injunction pending appeal; discretionary with chancellor.
1718. Review by Court of Appeals of judgments in contempt cases.
1719. Jurisdiction of Court of Appeals to pass upon merits.
1720. The same.

§ 1712. **Appeals from interlocutory injunctions allowed under act of March 3, 1891, and subsequent acts.** Questions of importance, some of which are of considerable difficulty, have arisen under the provisions of the act of Congress of March 3, 1891 and subsequent acts, creating the United States Circuit Courts of Appeals and defining their jurisdiction. Section seven of this statute, as originally enacted, provided, among other things, for appeals from interlocutory orders or decrees granting or continuing injunctions.<sup>1</sup> This section was afterward amended so as to authorize appeals from interlocutory orders or decrees refusing, dissolving or refusing to dissolve injunc-

<sup>1</sup> This section was originally as follows: "That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree

granting or continuing such injunction to the circuit court of appeals: Provided, That the appeal must be taken within thirty days from entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal." Act of March 3, 1891, c.

tions.<sup>2</sup> Both of these sections are now superseded by the act of July 6, 1900,<sup>3</sup> which, among other things, omits the provisions of the previous law for appeals from interlocutory orders or decrees refusing, dissolving or refusing to dissolve injunc-

517, § 7, 26 Stat., 8828. Under this act it was held that upon an appeal from an order granting an injunction and appointing a receiver, the propriety of only so much of the order as relates to the injunction is open to review. *Florida Coast Co. v. Young*, 8 C. C. A., 231, 59 Fed., 721.

<sup>2</sup> The amended section was as follows: "That where, upon a hearing in equity in a district court or a circuit court, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction to the circuit court of appeals: Provided, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal: And provided further, That the court below may in its discretion require as a condition of the appeal, an additional injunction bond." Act of February 18, 1895,

c. 96, 28 Stat., 666. Under the act as thus amended it has been held that an order partially dissolving a temporary injunction is appealable. *Bissell C. S. Co. v. Goshen S. Co.*, 19 C. C. A., 25, 72 Fed., 545.

<sup>3</sup> Section seven of the law as it now exists is as follows: "That where, upon a hearing in equity in a district court or in a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued or a receiver appointed, by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this Act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction or appointing such receiver to the circuit court of appeals: Provided, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court: And the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, or by the appellate court or a judge thereof, during the pendency of such appeal: Provided further, That the court below may in its discretion require as a condition of the appeal an additional bond." Act of June 6, 1900, c. 803, 31 Stat., 660; 1 U. S. Comp. Stat. 1901, p. 550.

tions, and an appeal will no longer lie from such orders.<sup>4</sup> The present statute is amendatory of the original act, and by necessary implication it repeals the act of 1895, and it now contains the entire law as administered in the federal courts upon the subject of appeals from interlocutory injunctive orders.<sup>5</sup>

§ 1713. **Limited to cases where appeals would lie from a final decree.** It will be observed that the act is expressly limited to cases where an appeal from a final decree could be taken to the Court of Appeals under other provisions of the statute, and it is accordingly held that an appeal will not lie from an interlocutory injunction granted in a suit in which the Court of Appeals would be without jurisdiction to entertain an appeal from a final decree. Thus, its jurisdiction can not be invoked for the purpose of reviewing an interlocutory injunction granted in an action in which constitutional questions are involved, since appeals in such cases, under section five, go directly to the Supreme Court.<sup>6</sup>

§ 1714. **Order refusing to modify or dissolve not appealable; otherwise if order continues injunction.** Where an order is entered granting a perpetual injunction against the infringe-

<sup>4</sup> *Westinghouse Co. v. Christensen Co.*, 44 C. C. A., 92, 104 Fed., 622; *Columbia Wire Co. v. Boyce*, 44 C. C. A., 588, 104 Fed., 172; *Omaha & S. W. R. Co. v. Chicago*, etc., Ry. Co., 45 C. C. A., 474, 106 Fed., 586; *Rowan v. Ide*, 46 C. C. A., 214, 107 Fed., 161; *Heinze v. Butte & B. C. M. Co.*, 46 C. C. A., 219, 107 Fed., 165; *Western Electric Co. v. Williams-Abbott Electric Co.*, 48 C. C. A., 159, 108 Fed., 951; *Berliner Gramophone Co. v. Seaman*, 51 C. C. A., 440, 113 Fed., 750; *March v. Romare*, 53 C. C. A., 574, 116 Fed., 354.

<sup>5</sup> *Columbia Wire Co. v. Boyce*, 44 C. C. A., 588, 104 Fed., 172; *West-*

*inghouse Co. v. Christensen Co.*, 44 C. C. A., 92, 104 Fed., 622; *Omaha & S. W. R. Co. v. Chicago*, etc., Ry. Co., 45 C. C. A., 474, 106 Fed., 586; *Rowan v. Ide*, 46 C. C. A., 214, 107 Fed., 161; *Heinze v. Butte & B. C. M. Co.*, 46 C. C. A., 219, 107 Fed., 165; *Western Electric Co. v. Williams-Abbott Electric Co.*, 48 C. C. A., 159, 108 Fed. 951.

<sup>6</sup> 1 U. S. Comp. Stat. 1901, p. 549; *City of Macon v. Georgia Packing Co.*, 9 C. C. A., 262, 60 Fed., 781; *Town of Westerly v. Westerly Waterworks*, 22 C. C. A., 278, 76 Fed., 467; *dictum in Wright v. MacFarlane*, 58 C. C. A., 570, 122 Fed., 770.



ment of a patent and referring the cause to the master for an accounting, an order refusing to modify or dissolve such injunction, made more than thirty days after it was granted, is not an order granting or continuing an injunction within the meaning of section seven and it is therefore not appealable.<sup>7</sup> So where a temporary injunction has been granted to continue until the further order of the court, and thereafter, more than thirty days having elapsed, a motion to dissolve is denied and overruled by the court, such order is not appealable under section seven.<sup>8</sup> So an order dismissing a motion to vacate a temporary injunction or refusing to dissolve or vacate such an injunction, is not an order continuing an injunction within the meaning of section seven, and is therefore not appealable.<sup>9</sup> In all such cases the appeal should have been from the original injunctive order within the thirty days prescribed by the act. But where a temporary injunction has been granted, to remain in force until the further order of the court, and thereafter an order is entered denying a motion to dissolve and continuing the injunction in force until the final hearing or until the further order of the court, such order is one continuing an injunction within the meaning of section seven, and an appeal will therefore lie therefrom, although more than thirty days may have elapsed since the granting of the original injunctive order.<sup>10</sup> But an order dismissing a restraining order and

<sup>7</sup> *Baker v. Baker & Co.*, 27 C. C. A., 396, 83 Fed., 3.

<sup>8</sup> *Dreutzer v. Frankfort Land Co.*, 13 C. C. A., 73, 65 Fed., 642.

<sup>9</sup> *Heinze v. Butte & B. C. M. Co.*, 46 C. C. A., 219, 107 Fed., 165; *Rowan v. Ide*, 46 C. C. A., 214, 107 Fed., 161.

<sup>10</sup> *Chicago Dollar Directory Co. v. Chicago Directory Co.*, 13 C. C. A., 8, 65 Fed., 463; *Berliner Gramophone Co. v. Seaman*, 47 C. C. A., 630, 108 Fed., 714. In the first case cited, *Baker, J.*, says: "When a

temporary injunction is granted to continue in force 'until the further order of the court,' and a motion is made to dissolve it, the continuance of the injunction in force is the question for hearing and judgment, and it is the duty of the court either to dissolve the injunction or continue it in force; and when the court refuses to dissolve the injunction, or orders it continued in force, its operations and effect thereafter depend upon the order so made. This construction

denying an injunction is not appealable under the statute in question.<sup>11</sup>

§ 1715. **Partial dismissal of bill in patent suit; no appeal by complainant.** Where a decree is entered dismissing a bill as to certain claims of patent, and sustaining it as to others, and enjoining infringement and referring the cause to a master for an accounting, an appeal will not lie upon behalf of complainant from that part of the decree which dismisses the bill. Such an order is not appealable as an interlocutory decree under the seventh section of the act, since, under the present statute, appeals will not lie from orders refusing or dissolving injunctions; nor can the appeal be taken under section six, since such an order is not a final decree in the cause.<sup>12</sup>

§ 1716. **When court may grant interlocutory injunction to enable defendant to appeal.** Under some circumstances of hardship to the defendant, the court may grant an interlocutory injunction upon the motion of defendant for the purpose of enabling him to take an immediate appeal. Thus, where the taking of an account of profits and damages in an action to restrain the infringement of a patent would require much time and would cause great expense and delay, the court may, at the instance of the defendant, grant an interlocutory injunction as prayed in the bill for the purpose of giving the defendant the right to an immediate appeal under section seven, although complainant makes no application for the provisional order. Such a course is one which rests in the sound discretion of the chancellor, and, in the absence of an abuse of such discretion, his action in so doing will not be disturbed upon appeal.<sup>13</sup>

gives effect to the plain language of the statute and best effectuates the remedial purpose of its enactment."

<sup>11</sup> *Robinson v. City of Wilmington*, 9 C. C. A., 84, 60 Fed., 469.

<sup>12</sup> *Marden v. Campbell P. P. & M. Co.*, 15 C. C. A., 26, 67 Fed., 809;

*Western Electric Co. v. Williams-Abbott Electric Co.*, 48 C. C. A., 159, 108 Fed., 951; *Thompson-Houston E. Co. v. Nassau E. R. Co.*, 50 C. C. A., 421, 112 Fed., 676.

<sup>13</sup> *Lockwood v. Wickes*, 21 C. C. A., 257, 75 Fed., 118.

§ 1717. **Staying effect of injunction pending appeal; discretionary with chancellor.** It will be observed that section seven of the act in question provides that, upon an appeal from an interlocutory order granting or continuing an injunction, the proceedings in the lower court shall not be stayed unless otherwise ordered by that court. Under this provision it is held that the defendant is not entitled as a matter of right to have the effect of the injunction stayed pending the appeal, but that the granting of a *supersedeas* in such case is a matter which lies within the discretion of the lower court and that the exercise of that discretion will not be controlled by *mandamus*.<sup>14</sup> So where an appeal is pending from a final decree granting a perpetual injunction, the question of staying the effect of the writ is one which rests within the discretion of the chancellor, and the reviewing court will not, pending the appeal and in advance of a final hearing, interfere with the exercise of the discretion thus lodged in the trial judge.<sup>15</sup>

§ 1718. **Review by Court of Appeals of judgments in contempt cases.** It is held, under the provisions of the act in question, that the Court of Appeals has jurisdiction to review a judgment or order of a circuit court finding one who is not a party to an injunction suit guilty of contempt of court for a violation of the order of the court and imposing a fine for such contempt; and that such order of the circuit court is reviewable writ of error and not by an appeal.<sup>16</sup> And the Court of Appeals has no jurisdiction over an appeal from an order imposing upon defendant a fine for contempt in violating a preliminary injunction, since, if the order imposing the fine is part of the original proceeding, it could be reviewed, under the statute in question, only upon an appeal from a final decree; while, if it is to be looked upon as a separate proceeding in the nature

<sup>14</sup> *In re Haberman Mfg. Co.*, 147 Indianapolis Water Co., 26 C. C. A., U. S., 525, 13 Sup. Ct. Rep., 527. 470, 81 Fed., 423.

<sup>15</sup> *American Strawboard Co. v.* <sup>16</sup> *Bessette v. Conkey Co.*, 194 U. S., 324, 24 Sup. Ct. Rep., 665.

of a criminal prosecution, it can be reviewed only by writ of error.<sup>17</sup>

§ 1719. **Jurisdiction of Court of Appeals to pass upon merits.** The question has frequently arisen upon appeals, taken under section seven of the act in question, from interlocutory orders granting or continuing injunctions, as to the jurisdiction of the Court of Appeals to pass upon the merits of the case as made out in the lower court. The question has usually come up in connection with injunctions pertaining to the infringement of patents and trade marks. And while, during the earlier days of the Court of Appeals, there was considerable conflict in the decisions of the reviewing courts of the various circuits, all doubt upon the question has finally been set at rest by the authority of the Supreme Court of the United States. Although the solution of the question will depend to some extent upon the circumstances of each case, it may be stated as the rule that, where the appeal is from an order granting or continuing a mere preliminary injunction, granted *pendente lite* or until the further order of the court or until final hearing, and where the bill is not without equity upon its face, the reviewing court may consider the case as made out in the court below only for the purpose of determining whether or not that court exceeded the limits of sound judicial discretion in the granting of such injunction upon the showing made in the application therefor, and in such case, the court should either affirm the action of the inferior tribunal in case the injunction was properly granted, or, if that court has exceeded the limits of a proper discretion in its action, and other relief be possible notwithstanding the fact that the injunction should have been denied or dissolved, they should reverse the action of the lower court with directions merely to dissolve the injunction, leaving that court, in all other respects in full control of the cause and free to determine all the issues involved upon

<sup>17</sup> Sessions v. Gould, 11 C. C. A., 550, 63 Fed., 1001. And see, *ante*, § 1466.

the final hearing.<sup>18</sup> And in such case, the jurisdiction to pass upon the merits can not be conferred by the consent of the parties.<sup>19</sup> Where, however, in the case of such an appeal from a preliminary injunction, the reviewing court is of the opinion that the bill is without equity upon its face and can not be cured by amendment, or concludes for any other reason that complainant will in no event be entitled to the relief sought, it should direct not only that the preliminary injunction be dissolved but that the bill be dismissed.<sup>20</sup>

§ 1720. **The same.** Upon the same principle, where the interlocutory order appealed from, although technically not a final decree in the case, is final in form so far as the relief by way of injunction is concerned, and has been entered after a full hearing of the case upon the merits, and the entire record is brought to the Court of Appeals, the jurisdiction of that court to pass upon the merits is clear. The most common illustration of

<sup>18</sup> *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S., 485, 20 Sup. Ct. Rep., 708, affirming S. C., 32 C. A., 231, 89 Fed., 333; *Brill v. Peckham M. T. Co.*, 189 U. S., 57, 23 Sup. Ct. Rep., 562; *Blount v. Societe Anonyme*, 3 C. C. A., 455, 53 Fed., 98; *Consolidated E. S. Co. v. Accumulator Co.*, 5 C. C. A., 202, 55 Fed., 485; *Jensen v. Norton*, 12 C. C. A., 608, 64 Fed., 662; *Duplex Printing-Press Co. v. Campbell Printing-Press Co.*, 16 C. C. A., 220, 69 Fed., 250.

<sup>19</sup> *Bissell C. S. Co. v. Goshen S. Co.*, 19 C. C. A., 25, 72 Fed., 545, approving so much of *Columbus Watch Co. v. Robbins*, 3 C. C. A., 103, 52 Fed., 337, as criticises the opinion expressed in *Jones Co. v. Munger Improved C. M. Co.*, 1 C. C. A., 668, 50 Fed., 785, to the effect that such jurisdiction may be conferred by the consent of the

parties. This criticism seems well founded.

<sup>20</sup> *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S., 485, 20 Sup. Ct. Rep., 708, affirming S. C., 32 C. C. A., 231, 89 Fed., 333; *Green v. Mills*, 16 C. C. A., 516, 69 Fed., 852; *Mayor v. Africa*, 23 C. C. A., 252, 77 Fed., 501; *Coffman v. Castner*, 31 C. C. A., 55, 87 Fed., 457; *Los Angeles University v. Swarth*, 46 C. C. A., 647, 107 Fed., 798, 54 L. R. A., 262; *Tornanses v. Mel-sing*, 47 C. C. A., 596, 109 Fed., 710; *Berliner Gramophone Co. v. Seaman*, 49 C. C. A., 99, 110 Fed., 30; *Worth Mfg. Co. v. Bingham*, 54 C. C. A., 119, 116 Fed., 785. In *Mayor v. Africa*, *supra*, the court decided, upon rehearing, to retain the bill, but not for any reason affecting the principle under discussion. And see *Eldred v. American P. C. Co.*, 44 C. C. A., 554, 105 Fed., 457,

an order of this kind is found in suits brought to restrain the infringement of patents or trade marks, where a decree is entered upon a full hearing of the cause, sustaining the validity of the patent or trade mark, finding infringement, perpetually enjoining such infringement and referring the cause to the master for an accounting.<sup>21</sup> Upon an appeal from such an order, the rule is well established that the reviewing court, having the entire record before it, may fully consider the merits of the case as made out in the lower court and may finally determine all questions relating to the validity of the patent or trade mark, its infringement and the propriety of the order perpetually enjoining such infringement.<sup>22</sup> And if, after a

in which it was held that where the litigation must eventually result in the dismissal of the bill because of the want of necessary parties who could not be brought in by amendment, the Court of Appeals should order the dismissal of the bill.

<sup>21</sup> Such a decree, though presumably final so far as relief by way of injunction is concerned, is nevertheless interlocutory and appealable under section seven of the statute in question. *Jones Co. v. Munger Improved C. M. Co.*, 1 C. C. A., 668, 50 Fed., 785; *Richmond v. Atwood*, 2 C. C. A., 596, 52 Fed., 10, 17 L. R. A., 615; *Bissell C. S. Co. v. Goshen S. Co.*, 19 C. C. A., 25, 72 Fed., 545; *Lockwood v. Wickes*, 21 C. C. A., 257, 261, 75 Fed., 118; *Raymond v. Royal Baking-Powder Co.*, 22 C. C. A., 276, 76 Fed., 465. In *Richmond v. Atwood*, *supra*, the court say: "We think the term 'interlocutory order or decree' was used in its broadest sense, and that the purpose of Congress was to confer the

right of appeal from any decree or order granting an injunction, at any stage of the proceeding, whether technically preliminary, interlocutory or final." And in *Keystone Iron Co. v. Martin*, 132 U. S., 91, 10 Sup. Ct. Rep., 32, it was held that a decree perpetually enjoining defendant from entering upon or removing minerals from plaintiff's land, and further ordering an account taken of the quantity and value of the ore already removed, and appointing a master to take evidence, was not a final decree from which an appeal might be taken from the circuit court to the Supreme Court. This case was decided on November 11, 1889, before the creation of the Court of Appeals. But see *Standard Elevator Co. v. Crane Elevator Co.*, 22 C. C. A., 549, 76 Fed., 767. Such a decree, being interlocutory, does not render the matters involved *res judicata*. *Brush Electric Co. v. Western Electric Co.*, 22 C. C. A., 543, 76 Fed., 761.

<sup>22</sup> *Smith v. Vulcan Iron Works*,

consideration of the entire case upon the merits, the court is convinced that plaintiff is for any reason not entitled to the relief sought, they should, by their mandate, direct not only that the injunction be dissolved but that the bill be dismissed.<sup>23</sup> And in the event of an affirmance after such a full consideration upon the merits, the inferior court has no further jurisdiction so far as the injunction is concerned, and it can not afterward dissolve, alter or suspend it.<sup>24</sup>

165 U. S., 518, 17 Sup. Ct. Rep., 407, 41 L. Ed., 810; *Richmond v. Atwood*, 2 C. C. A., 596, 52 Fed., 10, 17 L. R. A., 615; *Consolidated P. C. Co. v. Pacific Ry. Co.*, 7 C. C. A., 195, 58 Fed., 226; *Bissell C. S. Co. v. Goshen S. Co.*, 19 C. C. A., 25, 72 Fed., 545, overruling *Columbus Watch Co. v. Robbins*, 3 C. C. A., 103, 52 Fed., 337.

<sup>23</sup> *Smith v. Vulcan Iron Works*, 165 U. S., 518, 17 Sup. Ct. Rep., 407, 41 L. Ed., 810; *Richmond v. Atwood*, 2 C. C. A., 596, 52 Fed., 10, 17 L. R. A., 615. In *Jones Co. v. Munger Improved C. M. Co.*, 1 C. C. A., 668, 50 Fed., 785, *supra*, the court went into the merits of the case, but did so upon the ground that the parties had con-

sented to such a course, for which the case was criticised in *Columbus Watch Co. v. Robbins*, 3 C. C. A., 103, 52 Fed., 337, *supra*. Yet, having reached this conclusion, they refused to dismiss the bill, and, upon a rehearing, directed that their first judgment which ordered that the bill should be dismissed, should be modified so as merely to direct that the injunction be dissolved.

<sup>24</sup> *Bissell C. S. Co. v. Goshen S. Co.*, 19 C. C. A., 25, 72 Fed., 545. But see, *contra*, *Edison Electric Light Co. v. United States Electric Lighting Co.*, 8 C. C. A., 200, 59 Fed., 501; *Standard Elevator Co. v. Crane Elevator Co.*, 22 C. C. A., 549, 76 Fed., 767.

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